167-324

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 270.

LEWIS E. PARSONS, JR., APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 7, 1895.

(15,894.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 24, 1896.

1 In the Court of Claims.

LEWIS E. PARSONS, JR.,
vs.
THE UNITED STATES. } No. 18384.

I.—*Petition.*

On the 26th day of April, 1894, the claimant filed his original petition; and on the 4th day of December, 1894, by leave of court, he filed his amended petition, which is as follows:

Amended Petition.

To the honorable judges of the Court of Claims:

Lewis E. Parsons, Jr., of Birmingham, in the State of Alabama, respectfully represents that on the 4th day of February, 1890, after his nomination and confirmation, he was duly appointed, qualified and commissioned for the term of four years as attorney for the United States for the northern district of Alabama, and also to act as such for the middle district of Alabama;

That thereupon he entered upon the discharge of the duties of said office; that he has never resigned said office; that he now resides and has continued to reside, since the date of said commission, in the city of Birmingham, Alabama, and within the northern district of Alabama, and has given his personal attention to the duties of his office, and no cause of removal whatever now exists or has existed since his appointment.

The petitioner has faithfully performed the duties of said office in strict accordance with the law from the date of his appointment until the court refused to permit him longer to represent the United States as its attorney, as hereinafter shown.

2 That on, to wit: the 29th day of May, 1893, petitioner received a communication from the President of the United States in words as follows:

"EXECUTIVE MANSION,
"WASHINGTON, D. C., *May* 26, 1893.

"SIR: You are hereby removed from the office of attorney of the United States for the northern and middle districts of Alabama, to take effect upon the appointment and qualification of your successor.

"GROVER CLEVELAND.

"To Lewis E. Parsons, Jr., Birmingham, Ala."

Petitioner had no notice of any charge whatever having been preferred against him prior to said 29th day of May, 1893, and has not yet had any notice of the nature and character of any charge authorizing his removal, having been preferred against him.

so far as petitioner is informed and believes, no charge whatever has been preferred against him.

To the said communication from the President petitioner replied as follows:

"BIRMINGHAM, ALA., *June* 5, 1893.

"To the President of the United States, Washington, D. C.

"SIR: Your communication of the 26th May, 1893, assuming to remove me from office of United States district attorney for the northern district of Alabama, has been received and duly considered.

"My commission bears date February 4th, 1890, and authorizes me to hold said office for the definite term of four years from the date thereof, fixed by law, and I am advised by counsel, and it is my own opinion, that you have no power to remove me, and I respectfully decline to surrender the office.

"Very respectfully, LEWIS E. PARSONS, JR.,
"*United States Attorney for the Northern District of Alabama.*"

Which said reply was duly mailed to the President of the
3 United States, and upon the same day, namely, the 5th day of June, 1893, petitioner notified both the Attorney General of the United States and Emmet O'Neal that he declined to surrender the office of attorney of the United States for the northern district of Alabama to said O'Neal, who was named by the President as petitioner's successor, his (O'Neal's) appointment bearing date May 26, 1893.

Upon the 20th day of June, 1893, Emmet O'Neal moved the circuit court for the southern division of the northern district of Alabama, then in session in Birmingham, Alabama, to require petitioner to turn over to him all the books and papers and other property appertaining to the said office, which said motion was resisted by petitioner, but was granted by the court. However, the court did not adjudicate or determine the question of the title to said office, or the power of the President to remove petitioner.

In re O'Neal, 56 Fed. Rep., 293.
In re Parsons, 150 U. S. R., 150.

That on January 3d, 1894, petitioner applied to the Attorney General of the United States for permission to file a proceeding in the nature of a *quo warranto* in the name of the United States as plaintiff against Emmet O'Neal, to try the question of the title to said office, and offered to secure the costs of such proceeding, but the Attorney General refused to allow such proceeding to be instituted in the name of the United States as plaintiff.

That from January 1st, 1893, to May 26th, 1893, petitioner earned [illegible] in the circuit and district courts of the United States for the northern and middle districts of Alabama, [illegible] which fees were duly passed on and approved by the presiding judge of the district court of the United States

for the northern and middle districts of Alabama, [illegible] duly audited and approved by the Treasury Department.

That since the 26th day of May, 1893, and prior to the [illegible] of December, 1893, there have been earned over and above

4 said dollars, in fees, for services rendered by [illegible], Esq., who has been performing the duties of United States attorney since the 26th day of May, 1893, making a total of fees pertaining to said office for the year 1893 of over $10,405.40. Petitioner further shows that he paid out for stationery and for clerk hire during the year 1893, $1,088.31. That the Government has paid to petitioner only $3,487.34, leaving a balance due him for stationery and for clerk hire, for which petitioner paid, while he performed the duties of said office, and for salary and for fees and emoluments appertaining to said office and earned during the year 1893, $3,600.98, which amount has been demanded by petitioner and the payment thereof has been refused by the Government.

That on the 27th day of December, 1893, petitioner notified the Attorney General, the Secretary of the Treasury, the Treasurer and the First Comptroller of the Treasury, that petitioner would insist on the payment to him of all the fees and emoluments appertaining to said office during the whole of the period covered by petitioner's commission.

Wherefore petitioner prays judgment for the sum of $3,600.98, the balance due him for fees and salary, as aforesaid.

LEWIS E. PARSONS, Jr., *Claimant.*
JOSEPH H. PARSONS, *Attorney.*

DUDLEY & MICHENER,
R. R. McMAHON, *Counsel.*

STATE OF ALABAMA, *Jefferson County,* } ss:

Lewis E. Parsons, Jr., being duly sworn, deposes and says: That he is the petitioner herein; that he has read the above petition, and that the matters therein stated are true to the best of his knowledge and belief.

LEWIS E. PARSONS, Jr.

Subscribed and sworn to before me, a U. S. commissioner, northern district of Alabama, this 26th day of February, 1894.

ROB'T CHARLSON,
U. S. Circuit Court Commissioner,
Northern District of Alabama.

5 II.—*Traverse. Filed February* 13, 1895.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained; and asks [illegible] that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney General.

6 III.—*Findings of Fact and Conclusion of Law. Filed April 2, 1895.*

I.

Lewis E. Parsons, Jr., of Birmingham, in the State of Alabama, on the 4th day of February, 1890, after his nomination and confirmation, was duly appointed, qualified, and commissioned, for the term of four years, as attorney for the United States for the northern district of Alabama, and also to act as such for the middle district of Alabama.

II.

Thereupon he entered upon the discharge of the duties of said office; he has never resigned said office; and now resides, and since the date of said commission has continued to reside, in the city of Birmingham, Ala., and within the northern district of Alabama; he performed the duties of said office from the date of his appointment until the circuit court refused to permit him longer to represent the United States as its attorney, as hereinafter set forth.

III.

On the 29th day of May, 1893, the claimant received a communication from the President of the United States in words as follows:

EXECUTIVE MANSION,
WASHINGTON, D. C., *May* 26, 1893.

SIR: You are hereby removed from the office of attorney of the United States for the northern and middle districts of Alabama, to take effect upon the appointment and qualification of your successor.

GROVER CLEVELAND.

To Lewis E. Parsons, Jr., Birmingham, Ala.

Claimant had no notice of any charge having been preferred against him prior to said 29th day of May, 1893, and has not yet had any notice of any charge preferred against him.

IV.

To the communication from the President the claimant replied as follows:

BIRMINGHAM, ALA., *June* 5, 1893.

To the President of the United States, Washington, D. C.

SIR: Your communication of the 26th May, 1893, assuming to remove me from office of United States district attorney for the northern district of Alabama, has been received and duly considered.

My commission bears date February 4, 1890, and authorizes me — hold said office for the definite term of four years from the date thereof, fixed by law, and I am advised by counsel, and it is my own opinion, that you have no power to remove me, and I respectfully decline to surrender the office.

Very respectfully, LEWIS E. PARSONS, JR.,
United States Attorney for the Northern District of Alabama.

Which reply was duly mailed to the President of the United States, and upon the same day, namely, the 5th day of June, 1893, claimant notified both the Attorney General of the United States and Emmet O'Neal, Esq., who was named by the President as claimant's successor, that he declined to surrender the office of attorney of the United States for the northern district of Alabama to said successor, whose appointment bears date May 26, 1893.

V.

On the 20th day of June, 1893, Emmet O'Neal, Esq., moved the circuit court for the southern division of the northern district of Alabama, then in session in Birmingham, Ala., to require claimant to turn over to him all the books and papers and other property appertaining to the said office, which said motion was resisted by the claimant and was granted by the court.

VI.

On January 3, 1894, claimant applied to the Attorney General of the United States for permission to file a proceeding in the nature of a *quo warranto*, in the name of the United States, as plaintiff, against Emmet O'Neal, Esq., to try the question of the title to said office, and offered to secure the costs of such proceeding, but the Attorney General refused to allow such proceeding to be instituted in the name of the United States as plaintiff.

VII.

From January 1, 1893, to May 26, 1893, claimant earned in fees in cases in the circuit and district courts of the United States for the said northern and middle districts of Alabama, $6,405.40, and his account therefor has been duly passed on and approved by [illegible] John B. Bruce, judge of the district court of the United States for the northern and middle districts of Alabama, and has been duly audited and approved by the Treasury Department.

VIII.

That since the 26th day of May, 1893, and prior to the 31st day of December, 1893, there have been earned over $4,000, in fees, for services rendered by Emmet O'Neal, Esq., who has been performing the duties of United States attorney since the 26th day of May, 1893, making a total of fees appertaining to said office for the year 1893 of over $10,405.40. The claimant paid out for stationery and for clerk hire $1,088.31 during the year 1893, and the Government has paid him $3,487.34, leaving a balance of $3,600.98 for stationery and for clerk hire, for which petitioner paid, while he per-
8 formed the duties of said office, and for salary and for fees and emoluments appertaining to said office, and earned during the year 1893, $3,600.98, which amount has been demanded by him, and the payment thereof has been refused by the Government.

IX.

That on the 27th day of December, 1893, claimant notified the Attorney General, the Secretary of the Treasury, the Treasurer, and the First Comptroller of the Treasury that he would insist on the payment to him of all the fees and emoluments appertaining to said office during the whole of the period covered by claimant's commission.

Conclusion of Law.

Upon the foregoing facts the court determines as a conclusion of law that the claimant is not entitled to recover, and the petition is dismissed.

IV.—*Opinion of the Court.*

Opinion.

WELDON, J., delivered the opinion of the court:

It is alleged in the petition, and substantially shown by the findings, that the claimant was on the 4th day of February, 1890, after his nomination by the President and confirmation by the Senate, appointed and commissioned for the term of four years as attorney for the United States in and for the northern and middle districts of Alabama; that he thereupon entered upon the discharge of his duties as such attorney, and thereafter gave to the duties of said office his professional attention and care, until the 26th day of May, 1893; that upon that date he received from the President of the United States a communication as follows, to wit:

EXECUTIVE MANSION,
WASHINGTON, D. C., *May* 26, 1893.

SIR: You are hereby removed from the office of district attorney of the United States for the northern and middle district of Alabama to take effect upon the appointment and qualification of your successor.

To that communication the claimant replied in substance, that his commission bore date February 4th, 1890, for the term of four years; that he was advised by counsel that the President had no right to remove him, and therefore he declined to surrender the office.

On the 26th day of May, 1893, Emmet O'Neal, Esq., was appointed the successor of claimant, and on the 20th of June, 1893, he made application to the circuit court of the United States for the southern division of the northern district of Alabama for an order requiring claimant to surrender to him all the books, papers, and other property appertaining to said office. Upon such application the court made the order as requested; and the claimant accordingly surrendered the possession of all the books, papers and property belonging to his office as United States attorney. The claimant notified the Attorney General of the United States and his successor, that he declined to yield possession of his office before the granting of said order.

From January 1st, 1893, to May 26, 1893, the petitioner's fees in cases in the circuit and district courts of the United States of the northern and middle districts of Alabama amounted to the
9 sum of $6,405.40; his account therefor was approved by the court, audited and allowed by the Treasury Department; since the 26th day of May, 1893, and prior to the 31st day of December, 1893, there have been earned for services by his successor over the sum of $4,000, making an aggregate of fees earned in the office during the year 1893, the sum of $10,405.40; claimant paid during the year for stationery and clerk hire the sum of $1,088.31; and has received the sum of $3,487.34 for his services during the year 1893.

No charges were made against said claimant because of any delinquency in the discharge of his duty, to the knowledge of said claimant, though he made inquiry to ascertain if any were to be preferred.

The successor of claimant was confirmed by the Senate on the 22nd day of August, 1893, and from thence hitherto he has been in the possession of the office, and in the discharge of his duties, as he had been between the *the* 26th day of May and said date.

The facts thus briefly stated involve the question whether the removal of claimant, and the appointment of his successor by and with the advice and consent of the Senate, deprive him of the emoluments of his office during the remainder of the term for which he was commissioned.

Sections 767, and 769, of the Revised Statutes in substance provide, that there shall be appointed a district attorney of the United States for the northern district of Alabama; that he shall perform the duties of the middle district of said State; that his appointment shall be for the term of four years, and that the commission shall expire at the end of four years from its date. The claimant insists that because he was so appointed, and because his commission was for the term of four years, he has a vested right in the emoluments of the office for that period, and therefore, the removal by the Presi-

dent was without authority of law, and in violation of his right to serve during the term specified in the commission. The statute of 1789 providing for the appointment of district attorneys (1 Stat. L., p. 92) was intended for the exercise of the power of appointment recognized in section 2, article 2 of the Constitution, in which it is declared that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." Under this provision the President has the constitutional right of appointment of certain officers specified in the Constitution and such officers as he may by law be authorized to appoint.

The office of the United States attorney was created in the year 1789, and grew out of the necessity of having some person to represent the interest of the Government, in the various courts established by Congress and is a part of the judicial system established by the act approved September 24, 1789 (1 Stat. L. 92). The law provides "And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district." Nothing is said in the statute as to who shall appoint, nor what shall be the duration or term of service. Under that provision of the statute, the President in the exercise of his power of appointment, selected persons of the bar to represent the Government in all litigations incident to its civil business, and in the prosecution of crimes, misdemeanors and offences against the laws of the United States. The statute also provided for the appointment of an Attorney General of like professional qualifications, to represent the United States in the Supreme Court of the United States, and the performance of other duties prescribed by the statute.

The status of the office of district attorney so far as the power of appointment was concerned remained unaffected from 1789 to 1820, when an act entitled "An act to limit the terms of office of certain officers therein named and for other purposes" was passed (3 Stat. L., 582). Among the offices in that act enumerated is the office of district attorney. It is provided that the district attorney "shall be appointed for the term of four years but shall be removable from office at pleasure." Nothing is said in the act as to who shall appoint and the only reference to the President in the act is, that he shall have power to increase the bond of certain officers. The statute makes provisions for the expiration of the commissions issued before the passage of the law, and subjects them to the limitations of the statute, so as to conform to the policy of having a commission expire by limitation of time.

For a period of over thirty years, the President exercised the power of appointment under the act of 1789, without any legislative attempt to define or control his right as to the mode or manner

of appointment, or the time for which the appointment should be made. During that period, it is safe to assume that changes had been made in the office of district attorney and other offices by the Presidents who served during the period from 1789 to 1820. From these repeated removals it had become the practice and custom of the Executive to remove officers at pleasure without the authority or sanction of the Senate.

The record presents a grave question of constitutional law, and it is a remarkable feature of our judicial history, that, so far as we have been enabled to ascertain, it has never been definitely passed upon by either an inferior or Supreme Court of the United States. It is strange, that out of the many removals no litigation has arisen involving the direct question made by the facts of this case. The Court of Claims has been established for nearly forty years and yet no person has availed himself of its jurisdiction to determine the question of the right of a removed incumbent, to the emoluments of the office, for the unexpired portion of the term of his commission. The question of the power of the President to remove at his pleasure without the concurrence of the Senate was made in the discussion incident to the adoption of the Constitution in the pages of the Federalist. Chancellor Kent says:

This (that the power of removal rested with the President and Senate) was the construction given to the Constitution while it was pending for ratification before the State conventions, by the author of the Federalist. "The consent of the Senate," the Federalist observes, "would be necessary to displace as well as to appoint;" and he goes on to observe, that "those who can best estimate the value of a steady administration will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body, which, from the great permanency of its own composition, will, in all probability, be less subject to inconstancy than any other member of the Government." But the construction which was given to the Constitution by Congress, after great consideration and discussion, was different. In the act for establishing the Treasury Department, the Secretary was contemplated as being removable from office by the President. The words of the act are, "That whenever the Secretary shall
11 be removed from office by the President of the United States, or in any other case of vacancy in the office, the assistant shall act," &c. This amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon, as of decisive authority in the case. It applies equally to every other officer of Government appointed by the President and Senate, whose term of duration is not specially declared. It is supported by the weighty reason, that the subordinate officers in the executive department ought to hold at the pleasure of the head of that department, because he is invested generally with the executive authority, and every participation in that authority by the Senate was an exception to a general principle, and ought to be taken strictly. The President is the great responsible officer for the faith-

ful execution of the law, and the power of removal was incidental to that duty, and might often be requisite to fulfill it.

This question has never been made the subject of judicial discussion; and the construction given to the Constitution in 1789 has continued to rest in this loose, incidental, declaratory opinion of Congress, and the sense and practice of Government since that time. It may now be considered as firmly and definitively settled, and there is good sense and practical utility in the construction. It is, however, a striking fact in the constitutional history of our Government, that a power so transcendent as this is, which places at the disposal of the President alone the tenure of every executive officer appointed by the President and the Senate, should depend upon inference merely, and should have been gratuitously declared by the first Congress in opposition to that high authority of the Federalist; and should have been supported or acquiesced in by some of those distinguished men who questioned or denied the power of Congress even to incorporate a national bank.

By this eminent authority, the district attorney from the creation of the office in 1789 to 1820 by constitutional implication and construction held at the pleasure of the President, and after the passage of the act of 1820 that construction and implication was recognized by the statute, which continued in force and regulated the tenure of appointed officers, except certain judicial officers enumerated in the Constitution, until the passage of the tenure of office act of March 2, 1867 (14 Stat. L. 430). By that act it is enacted, "That every person who is appointed to any civil office by and with the advice and consent of the Senate and who becomes duly qualified to act therein shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified." That provision of the act was repealed by the act of April 5, 1869 (16 Stat. L. 6), and it was enacted instead "That every person holding any civil office to which he has been or may be hereafter appointed by and with the advice and consent of the Senate and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he shall have been appointed unless sooner removed by and with the advice and consent of the Senate, or by the appointment with the like advice and consent of a successor in his place."

These two statutes were incorporated into the Revised Statutes which were passed June 22, 1874, and declared the law as it existed December 1, 1873. The sections of the Revised Statutes embracing these statutes *was* repealed by the act of March 3, 1887, chap. 353 (1st Supp. R. S. 2d ed. 558).

We have quoted and cited all the statutes, which as we believe have been passed by Congress affecting the question at issue in this proceeding; and while they tend to throw light upon the pathway of investigation and decisions, are not absolutely decisive of the rights of the litigants. They still leave the question embarrassed with some doubt and uncertainty. The fact that Congress in the early days of the Government, after mature deliberation, and a discussion in which the ablest statesmen participated, decided to recog-

nize the power of removal in the President, is a strong argument in favor of that theory, and when in 1820, they legislated upon the subject of the tenure of office and by express terms subjected that
12 tenure to the pleasure of the President, is an additional argument in favor of the construction, that his prerogative of appointment and removal could not be limited or impaired. That construction of the Constitution and condition of legislation prevailed until the year 1867, when the act known as the tenure of office act was passed, establishing a new theory of constitutional law and a new policy of political administration. That act grew out of the peculiar state of civil society because of a readjustment of our institutions incident to the great civil war. It is not necessary to discuss the provisions of that measure as it was repealed by the act of 1887. It has passed into history, and is valuable as a legislative construction of the Constitution of the United States, in conflict with that theory, which had prevailed in the legislation of the country prior to its enactment. It is sufficient in this connection to state that the Supreme Court in the case of Embry *vs.* United States (100 U. S. 680) in which *was* involved the acts of 1867 and 1869 did not pass upon the constitutionality of the statutes inasmuch as that question was not necessarily involved. The court said:

The important constitutional question which has at times occupied the attention of the political department of the Government ever since its organization, and which was brought to our attention in the argument, is not, as we think, involved. The question here presented is not one of office, but of salary. Wherever the power of removal from office may rest, all agree that Congress has full control of salaries, except of the President and the judges of the courts of the United States. The amount fixed at any one time may be added to or taken away from at will. No officer except the President or a judge of a court of the United States can claim a contract right to any particular amount of unearned compensation. If an officer is not satisfied with what the law gives him for his services, he may resign.

The tenure of office act was not only in principle re-enacted by the act of April 2, 1869 (16 Stat. L. 6), but in the adoption of the Revised Statutes on June 22, 1874, Congress incorporated its provisions in the sections heretofore cited, as being the law in force on the first day of December, 1873.

The principle and policy of limiting the prerogative of the President enacted in 1867, continued until the act of 1887 (*supra*) was passed repealing whatever limitation was imposed by the act of 1867.

The act of 1887 is simply a statute of repeal, and has no provisions affecting the law beyond the negative quality of repealing the act of 1867 as modified by the act of 1869. When Congress adopted the Revised Statutes in July, 1874, they omitted from section 769 the words "shall be removable from office at pleasure" as found in the act of 1820 (3 Stat. L. 582) in order that the consistency of the law might be preserved, adopting as they did as part of the Revised

Statutes, the substance of the act of 1867 as amended by the act of 1869. Section 769 is an embodiment of the substance of the acts of 1789 and 1820 as will be seen by the marginal reference to those two statutes.

This being the state of the statutory law upon the subject, it leaves in force and for construction in the determination of the issue made by the facts, section 769.

It is insisted by counsel for claimant "that 'a term of four years' clearly means a continued, consecutive, uninterrupted enjoyment of the rights, emoluments and title of the office for that time." In support of this proposition reference is made to the case of Gaillard *vs.* Gaillard, 23 Miss. 152, and the case of Kimberlin *vs.* State, 130 Ind. 120.

13 The case of Kimberlin is that of a township trustee and the Supreme Court held in relation to his rights as an officer "Where an officer is lawfully elected and in the possession of an office his right to hold over continues until a qualified successor has been elected by the same electoral body as that to which he holds election or which by law is entitled to elect his successor." The case in 23 Mississippi is, that a term of three years as used in the law of divorce, must be without interruption and it is not proper to join two distinct periods in order to fill the measure of the statute. While these authorities tend to establish the proposition of counsel they do not reach the contention in this case.

It is also insisted, that as section 769 of the Revised Statutes was unaltered in terms, and unaffected by any specific mention in the repealing act of 1887, that that section is the law of this case; and as it provides a term of four years as the duration of the claimant's term, his removal before the expiration of his commission was unlawful, and does not deprive him of the right to the emoluments of his office as long as that term continues in time; that the act of 1820 was not revived by the repeal of the acts of 1867, and 1869, and therefore the pleasure of the President was eliminated from the statute and claimant's right was beyond the control of executive power founded upon the will of the President. The right to recover is by the argument of counsel placed upon section 769, and because that section, as it is claimed, makes the district attorney's office an absolute holding of four years, his removal without the proceeding of impeachment does not impair his right to the salary, and fees to the office. This case logically resolves itself into that issue.

If Congress intended by the repeal of the acts of 1867, and 1869, without reference to section 769, to leave in force the time as specified in that section and thereby circumscribe the prerogative of the President in the removal of the district attorney, it presents the question of the constitutionality of that section; but if Congress intended by the repeal of the acts of 1867 and 1869 to leave the question of the right of removal as it had been left by the legislation and practice of the Government from 1789 to 1867 then no question of constitutional law arises, and the issue is disposed of on an interpretation of the statute.

In the discussion of the constitutional right of the President to

remove an officer without the concurrence of the Senate many distinguished statesmen, jurists and authors have participated; and the question as one of constitutional philosophy is left where the disputations of learned men very frequently leave a question of moral reasoning still within the pale of doubt and uncertainty. We do not deem it necessary to indulge in any length of argument upon the question of the constitutional right of the President to remove at his pleasure, nor to determine upon which side of the question the weight of authority rests. Both sides of the issue are stated with admirable clearness in the learned treatise of Mr. Justice Story in his Commentaries upon the Constitution, 2 vol., secs. 1537 to 1541.

The question of the power of removal without the consent of the Senate came before the Supreme Court in the case of McAllister *vs.* The United States, 141 U. S. 174, on an appeal from this court. While that case does not decide the point at issue in this proceeding, it may be cited as tending to a correct understanding of the law applicable to the facts of the case at bar.

14 The Supreme Court in the McAllister case decided in substance that the claimant could be suspended under section 1768 of the Revised Statutes, and could be removed before the expiration of the term of service in the manner pointed out by said section, he not being one of the excepted officers of the law.

The theory of claimant in the McAllister case was, that he held by a life tenure, and was therefore not subject to removal, but the Supreme Court in affirmation of the judgment of this court decided, that he did not so hold, and that his removal was lawful in pursuance of the Revised Statutes and he could not therefore recover. The case is cited in the briefs of both counsel, the claimants contending that inasmuch as the case of Marbury *vs.* Madison (1 Cranch, 137) was cited that the Marbury case is applicable and decisive of the rights of the claimant. The case of Marbury is perhaps the most celebrated case in our judicial history, and while it has been the subject of adverse criticism because of a decision of constitutional questions not authorized by the questions in issue, its reasoning has never been successfully refuted, nor its legal conclusions denied by any decision of the Supreme Court of the United States. We are cited to the following extract from the opinion of Chief Justice Marshall:

Where an officer is removable at the will of the Executive, the circumstances which completes his appointment is of no concern, because the act is at any time revocable, and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the Executive the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the Executive is to be exercised until the appointment has been made; but having once made the appointment, his power over the office is terminated in all cases where by law the officer is not removable by him. The right to the office is then in

the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed, and as the law creating the office gave the officer a right to hold for five years, independent of the Executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country. * * *

The power of nominating to the Senate and the power of appointing the person nominated are political powers, to be exercised by the President according to his own discretion. When he has made an appointment he has exercised his whole power, and his discretion has been completely applied to the case. If by law the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But, as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and, consequently, if the officer is by law not removable at the will of the President, the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The office at issue in the Marbury case was that of justice of the peace for the District of Columbia, and did not pertain exclusively to the execution of the laws. The duty of the justice is to judicially apply the laws in the litigation of the citizens and the investigation in preliminary examinations of persons charged with crimes and misdemeanors. The district attorney is not a judicial officer; but an officer specially appointed to assist the executive branch of the Government in the execution of the law, by the prosecution of persons charged with a violation of law, and in that respect occupies a close official relation to the President in the execution and performance of the trust reported in him by the Constitution, by the laws and by the peculiar duties pertaining to his office as the executive head of the nation.

15 The Supreme Court said in the case of McAllister, "What may be the powers of the President over territorial judges, now that section 1768 is repealed, is a question we need not now discuss." So it may be seen, although the case is cited it does not decide the exact question at issue in this proceeding. In the case of *Ex parte* Hennen, 13 Pet. 259, it is said, "All offices, the tenure of which is not fixed by the Constitution or limited by law must be held either during good behavior or (which is the same thing in contemplation of law) during the life of the incumbent, or must be held at the will and discretion of some department of the Government and subject to removal at pleasure." Although the words "limited by law" are used by the court in another portion of it is said "No one denied the power of the President and Senate jointly to remove where the tenure of office was not fixed by the Constitution which was a recognition of the principle that the power of removal was incident to the power of appointment. But it was very

early adopted as the practical construction of the Constitution that this power was vested in the President alone."

In the case of The United States *vs.* Avery, reported in 1st Deady, 204, it is held in substance, that Congress having the right to create an office, have the power to prescribe the term, and that the incumbent will hold as against the power of the President during the term for which he was commissioned. The question was not properly in the record of that case, and but reflects the opinion of the judge on the abstract question of the power of the President.

In the case of The United States *vs.* Guthrie (17 Howard, 284) the question did not properly arise, and hence the court refrained from a decision affecting the power of the President to remove the petitioner. The decision was placed upon the ground, that mandamus was not the proper remedy to enforce the payment of the salary of a territorial judge who had been removed by the President. Mr. Justice McLean delivered a dissenting opinion, in which he took the ground, that the President had no power to remove an officer appointed by the advice and consent of the Senate, and in the opinion asserts many of the reasons which from the adoption of the Constitution had been used by the statesmen, jurists and authors against the constitutional theory, that the President has the right of removal.

In the case of Blake *vs.* The United States (103 U. S. 227) Mr. Justice Harlan discusses at length by the citation of opinions of distinguished law officers of the Government and decisions of the Supreme Court, the question of the power of the President to remove appointed officers both in the civil and military service of the Government. The case was that of a chaplain in the United States Army, and involved the question of the power of the President to remove an officer of the army. The court in substance held, that the President had the power to remove an officer of the army, by the appointment by and with the advice and consent of the Senate of his successor, and in support of this theory of the law quotes the opinion of Attorney General Legare in reply to the inquiry of the President as to whether he could strike the name of an officer from the roll without a trial by court-martial as follows:

Whatever I might have thought of the power or removal from office, if the subject was *res integra*, it is now too late to dispute the settled construction of 1789. It is according to that construction, from the very nature of executive power, absolutely in the President, subject only to his responsibility to the country (his
16 constituents) for a breach of such a vast and solemn trust. 3 Story Com. Const. 397, sect. 1538. It is obvious that if necessity is a sufficient ground for such a concession in regard to officers in the civil service, the argument applies *a multo fortiori* to the military and naval departments. * * * I have no doubt, therefore, that the President has the constitutional power to do what he did, and that the officer in question is not in the service of the United States.

He also quotes with approbation the opinion of Attorney General Cushing, in which he says:

I am not aware of any ground of distinction in this respect, so far as regards the strict question of law, between officers of the army and any other officers of the Government. As a general rule, with the exception of judicial officers only, they all hold their commissions by the same tenure in this respect. Reasons of a special nature may be deemed to exist why the rule should not be applied to the military in the same way as it is to civil officers, but the legal applicability to both classes of officers is, it is conceded, the settled construction of the Constitution. It is no answer to this doctrine to say that officers of the army are subject to be deprived of their commissions by the decision of a court martial. So are civil officers by impeachment. The difference between the two classes is in the form and mode of trial, not in the principle, which leaves unimpaired in both cases alike the constitutional power of the President.

The court held as the ultimate conclusion of law, that the appointment of the successor of Blake with the advice and consent of the Senate operated in law to supersede him, and thereby to remove him from his position as an officer of the army.

As has been said the omission of the words "at the pleasure of the President" from sect. 769 as found in the act of 1820, became a necessity, as the Revised Statutes adopted the substance of the acts of 1867 and 1869, in which the pleasure of the President was denied. The object of the repeal of the sections of the Revised Statutes (embodying the substance of the tenure of office act) by the act of 1887, was to restore the law to what it had been prior to 1867, and thereby leave to the President the exercise of the power of removal, as it had existed from 1789 to 1820, by constitutional interpretation, and from 1820 to 1867 by the terms of the act of 1820. Sec. 769 limits the term of the office, but that does not necessarily limit the right of the President to remove before the expiration of the term, and this, aside from the question as to whether Congress can limit the power of removal.

If the contention of the claimant be true, that the President even with the advice and consent of the Senate cannot remove, then the claimant's possession of the office can be reached only through the medium of an impeachment. This construction of the statute might result in the holding of many officers unworthy and incompetent until the end of the term, because it would be practicably impossible to determine the question of removal, by the slow and tedious process of impeachment. If the claimant as district attorney has the right to remain in office during the time limited in his commission, every other officer of the United States appointed for a specified period would have the same right, and to apply to them all, the proceedings of impeachment would involve the administration of the Government in endless confusion and disturbance.

Under the tenure of office act, the remedy was in the power of the President and Senate; but under the construction, that the incumbent has the right to hold except as against the power of impeachment that remedy is taken away, and the officer is beyond the jurisdiction and control of the power from which he derived his

authority to act. Upon any theory of the law, the power of
17 removal is incident to the power of appointment, and if the President and Senate concur in the removal it fills the measure of requirement, as contended for by the theory, that the President alone is not authorized to remove. The court said in the Blake case that the appointment of his successor, with the advice of the Senate operated to supersede him; yet the act of 1866 provided that an officer should not be removed in time of peace except upon the sentence of a court martial or in mitigation thereof.

The term of four years as used in sec. 769, is a limitation beyond which the officer cannot serve without a new appointment; but was not intended to limit the power of the President in the removal of officers holding Federal positions by appointment of the Executive. The officer is to hold for four years "subject to the conditions prescribed by law," and by the repealing effect of the act of 1887, the four years became subject to the power of the President to remove, as recognized by constitutional construction and the act of 1820 prior to the adoption of the act of 1867.

The President on the 26th of May, removed the incumbent, and on the 22d of May following the Senate concurred in the appointment of his successor, thereby ratifying and confirming the removal of the claimant. That ratification removed him from office, and unless he had a vested legal right in his office and its consequent emoluments, his removal is a complete answer to his demand in this proceeding. It is the opinion of the court, that he took the office subject to the right of removal, and the removal bars his right to recover. As we understand, the practice of the executive department, since the passage of the act of 1887, has been in accordance with its practice before the enactment of the act of 1867, and that construction sanctions the theory of the law indicated by this opinion. It is the judgment of the court that the petition be dismissed.

18 V.—*Judgment of the Court.*

At a Court of Claims held in the city of Washington on the first day of April, A. D. 1895, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants and do order, adjudge, and decree that the petition of the claimant, Lewis E. Parsons, Jr., be dismissed.

BY THE COURT.

19 VI.—*Application of Claimant for and Allowance of Appeal.*

LEWIS E. PARSONS, JR., *vs.* THE UNITED STATES. } 18384.

From the judgment rendered in the above-entitled cause April 2, 1895, in favor of the United States, the claimant, by his attorney,

on this 22d day of April, 1895, makes application for and gives notice of an appeal to the Supreme Court of the United States.

LEWIS E. PARSONS, JR.,
By J. H. PARSONS,
His Att'y-in-fact.

DUDLEY AND MICHENER, *Att'ys.*
R. R. McMAHON, *Counsel.*

Filed April 22d, 1895.
Allowed in open court April 22, 1895.

WILLIAM A. RICHARDSON,
Chief Justice.

20 In the Court of Claims.

LEWIS E. PARSONS, JR., *vs.* THE UNITED STATES. } No. 18384.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application of the claimant for and allowance of an appeal to the Supreme Court of the United States.

Seal Court of Claims. In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 27th day of April, 1895.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Case No. 15,894. Court of Claims. Term No., 270. Lewis E. Parsons, Jr., appellant, *vs.* The United States. Filed May 7th, 1895.

167-3

167-324

Supreme Court of the United States.

OCTOBER TERM, 1896.

LEWIS E. PARSONS, JR., *Appellant,*
vs.
THE UNITED STATES.
No. 270.

Appeal from the Court of Claims.

APPELLANT'S BRIEF.

A District Attorney has a fixed term of office, and is not subject to removal by the President before its expiration except for cause. If the law is wrong, the remedy is with Congress.

J. H. PARSONS, JR,
D. D. SHELBY,
W. W. DUDLEY,
L. T. MICHENER,
R. R. MCMAHON,
Attorneys for Appellant.

N. T. ELLIOTT, PR.

Supreme Court of the United States.

OCTOBER TERM, 1896.

LEWIS E. PARSONS, JR., *Appellant*,
vs.
THE UNITED STATES.
No. 270.

Appeal from the Court of Claims.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

It is alleged in the petition, and substantially shown by the findings, that the appellant was, on the 4th day of February, 1890, after his nomination by the President and confirmation by the Senate, appointed and commissioned for the term of four years as attorney for the United States in and for the northern and middle districts of Alabama; that he thereupon entered upon the discharge of his duties as such attorney, and thereafter gave to the duties of the office his professional attention and care until the 26th day of May, 1893, upon which date he received from the President of the United States a communication as follows, to wit:

"EXECUTIVE MANSION.

WASHINGTON, D. C., *May* 26, 1893.

SIR: You are hereby removed from the office of district attorney of the United States for the northern and middle district of Alabama, to take effect upon the appointment and qualification of your successor."

To that communication the appellant replied, in substance, that his commission bore date February 4, 1890, for the term of four years; that he was advised by counsel that the President had no right to remove him, and therefore he declined to surrender the office.

On the 26th day of May, 1893, Emmet O'Neal was appointed the successor of the appellant, and on the 20th of June, 1893, he made application to the Circuit Court of the United States for the southern division of the northern district of Alabama for an order requiring appellant to surrender to him all the books, papers, and other property appertaining to the office. Upon such application the court made the order as requested, and the appellant accordingly surrendered the possession of all the books, papers, and property, belonging to the office of United States attorney.

Before the granting of the order, the appellant notified the Attorney-General of the United States and Mr. O'Neal, that he declined to yield possession of the office.

From January 1, 1893, to May 26, 1893, the appellant's fees in cases in the Circuit and District Courts of the United States, of the northern and middle districts of Alabama, amounted to the sum

of $6,405.40; his account therefor was approved by the court, and audited and allowed by the Treasury Department. Since the 26th day of May, 1893, and prior to the 31st day of December, 1893, there have been earned for services by his successor over the sum of $4,000, making an aggregate of fees earned in the office during the year 1893, the sum of $10,405.40. Appellant paid during the year for stationery and clerk hire the sum of $1,088.31; and received the sum of $3,487.34 for his services during the year 1893.

No charges were made against the appellant because of any delinquency in the discharge of his duty, to the knowledge of said appellant, though he made inquiry to ascertain if any were to be preferred.

The successor of the appellant was confirmed by the Senate on the 22d day of August, 1893, and from thence hitherto he has been in the possession of the office, and in the discharge of its duties, as he had been between the 26th day of May and that date.

The facts thus briefly stated involve the question whether the removal of the appellant without charges, and the appointment of his successor by and with the advice and consent of the Senate, deprived him of the emoluments of the office during the remainder of the term for which he was commissioned.

The case is reported in 30 Ct. Cl. Rep. 222.

ARGUMENT.

I.

THE CONSTITUTION AND STATUTES.

1. *The early legislation on the subject and its meaning.*

In the grant of powers to the President in Sec. 2. Art. II, of the Constitution of the United States, it is declared that "he shall nominate, and by and with the advice of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: * * *"

In the absence of words of limitation, this constitutional provision authorized Congress to create officers and to fix their tenure.

See *Baker* vs. *Kirk*, 33 Ind., 527.

It is evident that the authors of the Constitution recognized the general principle, that the power to appoint to office is not inherent in an officer, and that he can only appoint when the power to do so has been confided to him expressly or by necessary implication.

Hovey vs. *State*, 119, Ind., 395;
People vs. *Hurlbut*, 24 Mich., 44;
Commonwealth vs. *Baxter*, 35 Pa. St., 263;
People vs. *Matthewson*, 47 Cal., 442;
6 Am. & Eng. Ency. Law, 294;
Paine on Elections, Sec. 699.

So, when it became necessary to legislate on the subject of Courts of the United States, in Sec. 35

of "*An Act to Establish the Judicial Courts of the United States*," which became a law September 24, 1789, it was enacted, "And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district," * * * 1 Stat. p. 92.

The statute then directed that he should take the oath of office, and prescribed his duties and compensation, but it did not fix any term of office or provide for his removal.

May 15, 1820, Congress passed an act (3 Stat. p. 582) entitled: "*An act to limit the term of office of certain officers therein named, and for other purposes.*" Sec. 1 of that act enacted "That from and after the passage of this act, all *district attorneys*, collectors of the customs, naval officers and surveyors of the customs, navy agents, receivers of public moneys for lands, registers of the land offices, paymasters in the army, the apothecary general, the assistant apothecarys general and the commissary general of purchases, to be appointed under the laws of the United States, *shall be appointed for the term of four years, but shall be removable from office at pleasure.*"

Sec. 2 of the act provided that commissions of such officers "now in office * * * shall cease and expire," if dated before September 30, 1814, at their dates ensuing September 30, 1820, and if dated after September 30, 1814, and before October 1, 1816, at their dates ensuing, September 30, 1821, and that "*all other such commissions should cease and expire at the expiration of the term of four years from their respective dates.*"

This act took the office of District Attorney out of the pale of legislative and executive interpretation, and put it upon the basis of a *fixed term subject to the right of removal.* This statute was the plain and unequivocal expression of the legislative will that District Attorneys should hold their offices for the time fixed, unless removed at the pleasure of the appointing power.

2. *The meaning of the words "for a term of four years."* The constitutional and statutory provisions quoted authorized the President to appoint a District Attorney "for a term of four years." If we consider the word *term* in its common and ordinary signification, it must be treated here as meaning "the time for which anything lasts; any limited time; as, the *term* of five years; the *term* of life" —*Webster's Dictionery.* The same meaning of the word obtains in legislation where it is "used to designate a fixed and definite period of time."

Speed vs. *Crawford*, 3 Metc., (Ky.), 207, 213.

The words, "a term of four years," clearly mean a continued, consecutive, uninterrupted enjoyment of the rights, emoluments, and title of the office for that time.

See *Gaillard* vs. *Gaillard*, 23 Miss., 152.

A term of office fixed by statute runs for the whole period named.

Kimberlin vs. *State*, 130 Ind., 120.

The word "period" in connection with the tenure of a public office is equivalent to the word "term," and its purport was ably discussed by Folger, J.,

in *People* vs. *Leask*, 67 N. Y., 521, and it was held to be "a stated and recurring interval of a time, a round or series of years, by which time is measured," and that its use in the statute fixed the term of office to be for the round of series of six years. And in harmony with that case is *People* vs. *McClave*, 99 N. Y. 83. See, also, *State* vs. *Chapin*, 110 Ind. 272.

The term of office, under the constitutional and statutory provisions quoted, may be compared to the term of a lessee, concerning which it is held that:

"The time between the making of the lease and its commencement in possession is no part of the *term* granted by it. The *term* is that period which is granted for the lessee or tenant to occupy and have possession of the premises. It is the estate or interest which he has in the land itself by virtue of the lease from the time it vests in possession. When, therefore, our statute speaks of a lease for a *term* not exceeding one year, and of a contract for a lease for a period not longer than one year, it has reference to the time for the tenant to possess and occupy the premises, and does not include any previous or intermediate time."

Young vs. *Dake*, 5 N. Y. 463.
Same case, 55 Am. Dec. 359.

This principle of permanency is emphasized by the enactment that the commissions of District Attorneys "shall cease and expire at the expiration of four years from their respective dates," made in pursuance of the constitutional command that the President shall commission all the officers of the United States. Sec. 3, Art. II.

The purpose and value of the commission were discussed at length in *Marbury* vs. *Madison*, 1 Cranch, 137, in which Marshall, C. J., said, on p. 157:

> "This is an appointment made by the President, by and with the advice and consent of the Senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still the commission is not necessary to appointment, though conclusive evidence of it."

And on p. 162, he said:

> "It is, therefore, decidedly the opinion of the court that when a commission has been signed by the President, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State."

The issuance of the commission, then, is the last solemn act of the President, evidencing the title of the officer to his office, and, in accordance with the language of the statute, it declares the title of the District Attorney for a term of four years, at which time it ceases and expires. It is evident, therefore, that it was the intent of Congress to give to District Attorneys, subject to removal, a fixed and definite term of four years, and no longer, and this intent is made apparent by the use of language, simple, direct, plain and unequivocal.

If the appointment had not been made for a fixed *term*, or if the statute had not fixed the *term*, then the power of appointment would necessarily have carried with it the power of removal, and it would not have been necessary to confer the power of removal.

Ex parte Hennen, 13 Pet., 230.

In *Marbury* vs. *Madison*. 1 Cranch, 162, Marshall, C. J., said:

> "Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern, because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be annulled. It has conferred legal rights which cannot be resumed.
>
> "The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases where by law the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.
>
> Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country."

And on p. 167, he said:

"The power of nominating to the Senate, and the power of appointing the person nominated, are political powers, to be execised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If by law the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and, consequently, if the officer is by law not removable at the will of the President, the rights he has acquired are protected by the law, and are not resumable by the President. Theycannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source."

In *McAllister* vs. *United States*, Mr. Justice Harlan, in delivering the opinion of the court, quoted at length from *Marbury* vs. *Madison*, and on p. 189 said:

"Nothing in those observations militates, in any degree, against the views we have expressed. On the contrary, the Chief-Justice asserted the authority of Congress to fix the term of a Justice of the Peace in the District of Columbia beyond the power of the President to lessen it by his removal, or by withholding his commission after his appointment has been made, pursuant to an act of Congress, by and with the advice and consent of the Senate, and after the commission has been signed by the President and sealed by the Secretary of State."

In 1 Kent's Com. side p. 309, it is stated that " on the first organization of the Government, it was made a question whether the power of removal *in case of officers appointed to hold at pleasure*, resided anywhere but in the body which appointed, and of course, whether the consent of the Senate was not requisite to remove. This was the construction given to the Constitution while it was pending for ratification before the State Conventions by the author of The Federalist. * * * But the construction which was given to the Constitution by Congress, after great consideration and discussion, was different. In the act for establishing the Treasury Department, the secretary was contemplated as being removable from office by the President. The words of the act are, '*That whenever the secretary shall be removed from office by the President of the United States*, or in any other case of vacancy in the office, the assistant shall act,' etc. This amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon, as of decisive authority in the case. It applies equally to every other officer of Government appointed by the President and Senate, *whose term of duration is not specially declared*."

Chancellor Kent wrote the text thus quoted in 1823 to 1826, as may be seen in his preface to the first volume of the first edition, and the act to which he refers in the quotation made is the Act of Sept. 2, 1789, Sec. 7 (1 Stat., at Large, pp. 65 to 67). The text quoted and the precedent thus stated apply to officers " whose term of duration is not specially declared," but such is not the case at bar.

The subject is discussed in 2 Story on the Const., Sec. 1537 to 1544, inclusive. Judge Story states the doctrine of The Federalist, and refers to the

debate in 1789 upon the bill for organizing the Department of State, and he begins the discussion in Sec. 1537 with these words:

"It is observable that the Constitution makes no mention of any power of removal by the Executive of any officers whatsoever. As, however, the tenure of office of no officers, except those in the judicial department, is by the Constitution provided to be during good behavior, it follows by irresistible inference that all others must hold their offices during pleasure *unless Congress shall have given some other duration to their office.*"

The bill for organizing the Department of State referred to by Judge Story is to be found on pp. 68 and 69. 1 Stat. at Large, and a reading of it discloses the fact that the officers therein named had no tenure of office, but such is not the case at bar. It should be observed, also, that the interpretation spoken of by Chancellor Kent and Judge Story is legislative interpretation only and not judicial, and that it related to offices with no fixed term.

In *Ex parte Hennan*, 13 Pet., 256, 259, it is held that:

"All offices, the tenure of which is not fixed by the Constitution *or limited by law*, must be held either during good behaviour, or (which is the same thing in contemplation of law) during the life of the incumbent; or must be held at the will and discretion of some department of the Government, and subject to removal at pleasure." In the case at bar the tenure is *limited by law.*

In *Blake* vs. *United States*, 103 U. S., 227, the case of *Ex parte Hennan*, *supra*, was cited and

quoted from with approval, and many other cases were reviewed and quoted, and it was held by the Supreme Court:

"That there was no purpose, by the fifth section of the Act of July 13, 1866, to withdraw from the President the power, with the advice and consent of the Senate to supercede an officer in the military or naval service by the appointment of some one in his place."

The Supreme Court did not express an opinion as to the right of Congress to subject the President and Senate to restrictions by statute concerning the power of removal, and said that "it is sufficient for the present case to say that Congress did not intend by that section to impose them." Thus it appears that the question involved in the case at bar was not passed upon by that court in Blake's case.

In *McAllister* vs. *United States*, 141 U. S., 174, the claimant was appointed judge of the District Court of the District of Alaska for the term of four years. One year afterwards the President suspended him from office, and appointed Dawne successor. The Supreme Court reviewed the decisions at great length, considered the tenure of office act fully, and held that a judge of the District Court of the District of Alaska is not a judge of the court of the United States within the meaning of the exception in Sec. 1768 of the Revised Statutes relating to the tenure of officers, and was, therefore, prior to the repeal of that section, subject to removal, before the expiration of his term by the President. The court quoted with approval the language of

Chief Justice Marshall in *Marbury* vs. *Madison*, in which he said that "when the officer is not removable at the will of the Executive, the appointment is not revocable and cannot be annulled." But in the case at bar the officer removed by the President was an officer of the United States holding an office *the tenure of which was fixed by law.*

3. *The Tenure of Office Act.*

So stood the statutory law until the Tenure of Office Act was passed in 1867. That act is embodied in Sec. 1767 to 1772 inclusive, of the Revised Statutes. Sec. 1767 is as follows:

"Every person holding any civil office to which he has been or hereafter may be appointed by and with the advice and consent of the Senate, and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he was appointed, unless sooner removed by and with the advice and consent of the Senate, or by the appointment, with the like advice and consent, of a successor in his place, except as herein otherwise provided."

The other sections relate to the suspension and removal of officers and the filling of vacancies. These sections clearly repeal all other statutes providing for the removal or suspension of officers. The several sections cited were repealed by the Act of March 3, 1887, 24 Stat. at Large, 500, and being repealed no statutory power was left in the President to suspend or remove an officer with a *fixed term of office.* Such previous statutes as conferred the power to remove District Attorneys were re-

pealed by the Tenure of Office Act, and it in its turn being repealed by Congress, the former acts conferring the power of removal were not revived. "Whenever an act is repealed, which repeals a former act, such former act shall not thereby be revived, unless it shall be expressly so provided." R. S. Sec. 12, being the Act of February 25, 1871.

4. *The statute as it now stands.*

Again, when the Revised Statutes were adopted or enacted, all statutes previous to December 1, 1873 (no portion of which is embraced in the revision), were expressly repealed, except so far as they were inserted in the Revised Statutes. R. S. Sec. 5596; *United States* vs. *Bowen*, 100 U. S., 508, and the cases cited in Gould & Tucker's Notes on the Revised Statutes, pp. 1048, 1049. Now, Sec. 769, Revised Statutes, declares that "District Attorneys shall be appointed for a term of four years, and their commissions shall cease and expire at the expiration of four years from their respective dates." In *United States* vs. *Bowen*, 100, U. S., 508, 513, it is said:

"The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress."

Prior to the repeal of the Tenure of office Act, Sec. 1867 to 1887 inclusive, so far as they affected the office of District Attorney, had to be considered and construed in connection with Sec. 769, but when the former sections were repealed the latter stood alone as the expression of the legislative will concerning the tenure of office of District Attorneys, and it is to the latter section that this court must direct its attention in the case at bar. That section gives him a tenure of four years, and does not confer the power of removal upon the President. As the power of removal has not been conferred elsewhere it does not now exist.

In the case before the court, the statute (Sec. 769) enacted in pursuance of the constitutional provision fixed the *term* of the office at four years, and conveyed to the President the power to appoint and commission the officer for that length of time and no more.

The grant of these powers without a power of removal at pleasure, must be considered as a denial of that power to the Executive, and an exclusion of the idea that the term of office of the District Attorney is dependent on the will or pleasure of the appointing power.

> *State* vs. *Chatburn*, 63 Iowa, 659 ;
> *Same case*, 50 Am. Rep., 760.

The failure to grant the power of removal to the President by statutory enactment, is equivalent to a denial of the right. Mechem on Public Offices, sec. 450, and cases cited. The language of the Statute giving the right to appoint and commission is

such as to deny the right of removal by implication, as an incident of the power to appoint.

> Paine on Elections, Sec. 708, 717;
> Mechem on Pub. Offices, Sec. 445;
> *Collins* vs, *Tracy*, 36 Texas, 546.

5. *The only lawful method of removal is by impeachment.*

The only method prescribed by law for removing a District Attorney is by "impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." Sec. 4. Art. II, of the Constition. The constitutional command is, that "all civil officers of the United States" shall be removed from office on impeachment, and Congress has not provided any other way for the removal from office of District Attorneys, or given the right of removal to the appointing power. Throop on Public Officers, sec. 362, and cases cited.

6. *But even if the President had the right of removal, it could only exist for cause, and after notice and hearing given to the officer.* *Hallgren*, vs. *Campbell*, 82 Mich., 255 (Same case, 21 Am. St. Rep., 557), it is said:

> "We have not found any case where an officer who was appointed for a fixed term (and when the power of removal was not expressly declared by law to be discretionary) has been held to be removable except for cause, and wherever cause must be assigned for the removal of the officer, he is entitled to notice, and a chance to defend.

Field vs. *Commonwealth*, 32 Pa. St., 478;
State vs. *City of St. Louis*, 90 Mo., 19."

To same effect is, *Mechem on Public Offices*, Sec. 454. And in *State* vs. *Harrison*, 113 Ind., 234 (*Same case*, 3 Am. St. Rep., 663), it is said:

> "The final adjudication of such a right is, unless otherwise specially provided by competent authority, a matter of judicial concern, in respect to which the prior claimant is entitled to be heard in a forum whose proceedings are distinguished by the cautionary methods appropriate to the ascertainment and protection of personal and property rights. *Page* vs. *Hardin*, 8 B. Mon., 643; *Commonwealth* vs. *Meeser*, 44 Pa. St., 341; *Dullam* vs. *Willson*, 53 Mich., 392."

See also, Troop on Public Offices, Sec. 362, *et seq*; Mechem on Public Offices, Sec. 455.

7. *As the office was in the occupancy of the appellant, who had been lawfully appointed to it, there was no vacancy which the President could fill by appointment.*

"An office is not vacant so long as it is supplied in the manner provided by the Constitution or law with an incumbent who is legally qualified to exercise the powers, and perform the duties, which pertain to it. * * *

"An office is legally vacant unless the occupant has an unexpired right or title, found in the constitutional law, precisely as a house is vacant of a lawful tenant in case the lessee, without any pro-

vision authorizing him to hold over, refuses to surrender at the expiration of the term."

State vs. *Harrison*, 113 Ind., 234;
Same case, 3 Am. St. Rep., 663.

An appointment to fill a vacancy is void when there is no vacancy.

State vs. *Harrison*, 113 Ind., 434;
Kimberlin vs. *State*, 130 Ind., 120.

In the case at bar, the claimant had an unexpired right or title found in the Constitution and the law, precisely as a lawful tenant would occupy a house, with right and title, until the expiration of the term fixed by the lease. Therefore it follows that the term of the officer, like the term of the tenant, had not expired, and the office not being vacant, the President had no right to appoint the present incumbent.

8. *The appellant having been wrongfully deprived of the emoluments and perquisites of his office, from the time of his ejection, from it until the expiration of the date of his term, is entitled to the perquisites and emoluments earned during that period.*

This principle is established by,—

Redgrave vs. *United States*, 116 U. S., 474;
United States vs. *Perkins*, 116 U. S., 483;
Andrews vs. *Portland*, 79 Me., 484;
Same case, 10, Am. St. Rep., 280;
State vs. *Carr*, 129 Ind., 44;
Same case, 28 Am. St. Rep., 163.

II.

THE EXECUTIVE, LEGISLATIVE, AND JUDICIAL INTERPRETATIONS.

1. The learned judge who wrote the opinion of the court below began the discussion of the power of removal by saying:

"For a period of over thirty years, the President exercised the power of appointment under the act of 1789, without any legislative attempt to define or control his right as to the mode or manner of appointment, or the time for which the appointment should be made. During that period, it is safe to assume that changes had been made in the office of district attorney and other offices by the Presidents who served during the period from 1789 to 1820. From these repeated removals it had become the practice and custom of the Executive to remove officers at pleasure without the authority or sanction of the Senate."

Record, pp. 8, 9; 30 Ct. Cl. Rep., 240.

This statement is opposed to the truth of history, and upon it is based the judgment of the Court of Claims. "Repeated removals" were not made during the period named by the court.

In the 1st session, 47th Cong., Mr. Pendleton, from the Committee on Civil Service and Retrenchment, submitted a report advocating the enactment of the Civil Service law, and on p. IV of the report it was said:

"These abuses have grown out of a system comparatively new in our government. Appointments because of special fitness and removals for cause were the rule in its early history."

"During the eight years of General Washington's administration there were only nine removals, and all for cause. Mr. Adams made nine removals also, but it is believed that none were because of a difference of political opinion. Mr. Jefferson removed only thirty-nine office-holders, and he repeatedly and solemnly declared that not one was removed because the incumbent belonged to a political party different from his own. Mr. Madison, during eight years, made five removals. Mr. Monroe, during eight years, made nine, and Mr. John Quincy Adams, during four years, made but two.

"The Select Committee on Retrenchment, appointed by the House of Representatives in 1868, made this statement:

"Of course these removals were among the class of officers which required confirmation by the Senate; but if we should inquire concerning the inferior officers who are within the scope of the bill herewith reported we should find that the number of removals was even less in proportion to the whole. These officers were selected with great care, and for their fitness to discharge the duties required of them, and retained their places although their chiefs might be removed. The committee have inquired from the sources of information accessible, but have not learned of a single removal among this class of inferior officers, except for cause, from the commencement of the administration of President Washington to the accession of President Jackson."

Mr. Dorman B. Eaton, in an article entitled "Removals From Office," in a Cyclopædia of Political Science, edited by John J. Lalor, Vol. III, p. 568, discusses this subject, and says:

"From the beginning of our national administration until Jackson came to the Presidency, it was

the accepted theory and the constant practice that removals were not to be made without good cause; and that, unless in the cases of the legal advisers of the President and perhaps a few others, political opinion did not constitute such a cause. Under Jefferson, and the second Adams especially, there was great pressure for removals for political reasons. But they, and each of the first six Presidents, standing upon principle and a sense of public duty, nobly resisted that partisan demand; altogether making only seventy-three removals in the forty years covered by their terms. Of these, Washington made nine, and all for cause; John Adams, nine, and none on mere political grounds; Jefferson, thirty-nine, of which he said none were for party reasons; Madison, five; Monroe, nine; and John Q. Adams only two, and both for cause. It is certain that not one of these Presidents made a proscription or partisan removal according to the later practice. With Jackson's accession to the Presidency a new spirit triumphed. Offices were treated rather as party spoils than as public trusts. Removals were made for the treble purpose of punishing political opponents, of rewarding subservient supporters, and 'of strengthening the party.' In the year from March 4, 1829, to March 4, 1830, President Jackson appears to have made 734 removals."

See, also, 2 Story on Const. (3d ed.), Sec. 1543.

From 1789 to 1829, or nine years longer than the period named by the court, six Presidents removed from office, of the thousands in office during that whole time, but 73 officials. Yet the court below thought it "safe to assume that many changes had been made in the office of District Attorney and other offices * * * during the period from 1789 to 1820," and held that "from these repeated remov-

als it had become the practice and custom of the Executive to remove officers at pleasure without the authority or sanction of the Senate."

Under the law of 1789, there was no fixed tenure of office, no term was named, no power of removal granted or recognized in terms or by implication. But very few removals were made. Then came the law of April 20, 1820. Why was it passed? There was a reason for its passage. Such radical changes are not made without reason good or bad.

Mr. Dorman B. Eaton, in an article entitled "Term and Tenure of Office," in a Cyclopædia of Political Science, edited by John J. Lalor, vol. III p. 900, discusses this subject and says:

"On April 20, 1820, about thirty days before the adjournment of Congress, a bill, drawn by Mr. Crawford, was reported in the Senate, which created a term of four years for district attorneys, collectors, naval officers, navy agents, surveyors of customs, paymasters, and for several other less important officers. Mr. Adams says the object of the law was to gain support for Crawford for the presidency. The officers thus subjected to the new term are said to have become 'ardent Crawfordites.' This was the first fixed term for any such office. The bill further declared that the holdings of all such officers whose commissions were dated September 30, 1814, should expire on the day and month of their date next after September 30, 1820. The expiration of other holdings was fixed for a year later. The bill was thus *retroactive, and it made the terms expire on the eve of the Presidential election.* There was to be a Presidential election in 1824, when Crawford and Jackson were to be leading candidates. How largely and promptly this change would add to the patronage of the Treasury, where Mr. Crawford

presided, need not be pointed out. But these were hardly the most ominous provisions of the bill; for, taking the side of the partisan spoilsmen, against the approved doctrines of Madison, and the practice of every President, it declared that those officers 'shall be removable at pleasure.' Here was rotation legalized for the sake of rotation. Here was the first demand of surrender ever made upon the general government in the spirit of the New York spoils system. Here was practically a revolution in the term and tenure of office; an emphatic degradation of the standard according to which the fate of every one of these officers was to be determined. Without debate, in silence, suddenly, almost stealthily, this disastrous bill was carried through both houses. Mr. Adams, then Secretary of State, says President Monroe signed the bill without perceiving its true character. The avowed reason, or rather the apology, for the new policy, was that it would remove unworthy officials; the speciousness of which appears in the facts that the tenures of all in office, worthy and unworthy alike, were, without inquiry, severed absolutely; and nothing but official pleasure was to protect the meritorious in the future. There was no showing of delinquencies; no charge that the President could not or would not remove unworthy officials, not a word of discussion not a record of votes, on this revolutionary bill. But there were statesmen who foresaw the disastrous consequences. On November 20, 1820, Mr. Jefferson, in a letter to Madison, said of the law that 'it saps the constitutional and salutary functions of the President, and introduces a principle of intrigue and corruption which will soon leaven the mass, not only of Senators, but of citizens. * * * It will keep in constant excitement all the hungry cormorants for office; render them, as well as those in place, sycophants to their Senators, * * * and make of them, what all execu-

tive directories become, mere sinks of corruption and faction. It must have been one of the midnight signatures of the President, when he had no time to consider or even to read the law.' Madison replied in the same spirit, When Mr. Calhoun, then Secretary of War, heard of the sudden passage of the bill, he declared it 'one of the most dangerous ever passed, and that it would work a revolution.'"

The law of 1820 was passed because the "practice and custom of the Executive" to remove *for cause only* was not satisfactory to the "spoilsmen" of that day, who had determined that there should be a *fixed term* of office, and a legislative declaration of the right of *removal at pleasure.*

This law of 1820, however, was not pleasing to many eminent statesmen, and repeated efforts were made by them to repeal it, one of which is graphically described by Mr. Dorman B. Eaton, in an article entitled "Term and Tenure of Office," in a Cyclopædia of Political Science, edited by John J. Lalor, Vol. III, p. 900, in which he says:

"The attempt made in the Senate in 1825 to repeal the law of 1820 was renewed in that body in 1835. Despite the weight of Jackson's administration against it, the repealing act passed the Senate by a vote of 31 to 16; every distinguished name in the Senate—Benton, Webster, Clay, Calhoun, Ewing, Southard and White, among them, except Buchanan, of Pennsylvania, and Wright, of New York, those States then, as of late, being pre-eminently the 'machine,' 'spoils system' States—being recorded in favor of the repeal. The Senate had not at that time come very much under the vicious influence of patronage, or of the feudal code called 'the courtesy,' which have in late years been

so disastrously potential to that body. There had been few officers to confirm. In the debate upon the repealing act, though several Senators boldly avowed the barbarous creed of Marcy, Webster said the evil effects of the law of 1820 vastly predominated, and that he was for staying the plague. Mr. Clay declared 'the tendency had been to revive the dark ages of feudalism.' Mr. Calhoun stated, that 'the law had taught officers that the most certain road to honor and fortune is servility and flattery.' Mr. Southard declared that 'it had tended to make office-holders servile suppliants, destitute of independence of character and manly feeling.' The partisan power which the four years' term had thus suddenly and vastly increased, aided by the prestige of Jackson's administration, and the forces marshaled for Van Buren's election to the presidency the next year, defeated the repealing act. The victory of the spoilsmen increased the pressure and strength in favor of extending short terms, which the partisan leaders demanded. They next laid siege to the post-office department."

No effort to repeal or modify the law of 1820 was successful except in the solitary instance of the Tenure of Office Act, passed in 1867 and amended in 1869. 16 Stat., 6.

So the legislation may be summarized as follows:

1. Law of 1789, no term fixed, nothing said about removal.

2. Law of 1820, four years' term fixed, right of removal at pleasure.

3. Law of 1867, amended in 1869, tenure of office act, term rights secured, removal with advice and consent of Senate.

4. Law of 1887, repealing tenure of office acts, thus leaving statute as it now is in R. S. Sec. 769.

This shows that from 1820 to 1867, the President had the right to remove at pleasure, and from 1867 to 1887, he had the right to remove with the advice and consent of the Senate, and since then he has not had the statuatory rights of removal. Since 1820, the legislative branch has claimed and exercised the right to define and restrict the President's right of removal, and the courts have not disputed the power of Congress to do so.

There being no statute conferring the power of removal upon the President, the next question is whether or not it is conferred on him by the Constitution of the United States. The question is not one of the general power of removal in the absence of a constitutional provision or a statute fixing the tenure of office, but it is whether or not the Constitution confers on the President the power to remove an inferior officer whose office is created by law and the term fixed by the power which created the office. We quote from Article second of the Constitution of the United States, the parts that are usually cited when this question is under discussison. "The executive power shall be vested in a President of the United States of America; * * * he shall nominate and by and with the advice and consent of the Senate, shall appoint ambassadors, all other public ministers and consuls, Judges of the Supreme Court, *and all other officers of the United States, whose appointments are not*

herein otherwise provided for, and which shall be established by law, but the Congress may by law vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session; * * * he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States."

In the discussion of the President's power of removal of officers, those who claim that he has such power under the Constitution, invariably describe it as an implied power. The Constitution certainly confers no express power of removal, for the subject is not referred to in the enumeration of the President's powers. The removal of civil officers is provided for by impeachment, but in such cases the removal is by the Senate and not by the President. If he have such implied power in some cases, it would be logically impossible to make it applicable to the offices of United States District Attorneys, for they belong to that class of inferior officers whose offices are *created by statute*, and whose appointment is not vested in the President by the Constitution; for that instrument has left it within the power of Congress to vest the right to appoint them "in the courts of law or in the heads of department." If Congress has the power, as it clearly has by the words of the Constitution, to provide that the President shall not appoint these officers, it cannot be questioned that it also has the power to fix

he terms of office beyond the control of the executive power. But has the President any implied power of removal? It cannot be derived or inferred from his general executive authority, for the duty to execute the laws no more includes the power to remove an officer than it does to create an office. He can execute but not make laws. It is necessary to raise revenues to have the laws executed, and yet no one would claim that the President would have the power to levy a tax.

The President is the Prime Minister of the Nation rather than its monarch. He is subject to law, and has no claim to the infallibility which the doctrine of divine right ascribes to kings. The Constitution substituted for divine right a reign of law. When the President acts, his authority must exist. He cannot ask that his command shall be a justification for a breach of law. 2 Hare's Am. Const. Law, 844. The power to remove officers at will is clearly not a necessary part of his executive authority. It has often been conferred upon him; it may sometimes be wise to do so, but when he has such power it is by virtue of a statute which vests him with the power, and it is not a part or incident of his executive power, or such statutes never would be enacted. The offices in question are created by statute. The duties of those who fill them are defined; their pay prescribed; and their tenure, or mode or manner of removal, may be regulated by law. *If the President had the constitutional power to remove, it could only be limited by the Constitution, and yet Congress has often regulated the removal of officers and fixed their terms.*

"The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." The power conferred by this section arises from necessity, because the public service would suffer unless the vacancy is filled. "Fill up vacancies that may happen," are the words used. The provision that the commission expires at the end of the next session excludes the conclusion that the President may *create* vacancies to fill, for if he has that right the Senate would be without authority in the matter, and the President could *create* vacancies in every office and renew the commissions of his appointees after each adjournment of the Senate, if it failed to consent to his appointments. He would be the master of all offices to be filled by appointment, and the Senate's advice and consent would be without force. The vacancies referred to by the Constitution are those which may happen by death, resignation, the expiration of term, removal by impeachment, or removal by authority conferred by statute.

The vacancies referred to in this paragraph of the Constitutian are those that may *happen* during the recess of the Senate. If the vacancies happen during a session of the Senate, and the office is one to be filled by the President and Senate jointly, the President should make the appointment while the Senate is in session. In responding to a question of this kind, Mr. Justice Jackson said: "The vacancy having occurred during the session of the Senate, I do not think the President has the au-

thority, under the Constitution, to fill it during the recess of the Senate." *In re Yancy*, 28 Fed Rep., 450.

If it be true that the President has no authority, under the Constitution, to fill a vacancy during the recess of the Senate which happened while the Senate was in session, surely the Constitution does not confer on him the power to both *create* and *fill* vacancies during the recess of the Senate.

If the statute fixing the term of this office is constitutional, then the President has no such right of removal as is claimed here. Congress has often exercised such power heretofore without question.

The first section of the Act of May 15, 1820, fixed the term of District Attorneys at four years, and provided (what is now repealed) "that they should be removable from office at pleasure." In 1863 Congress passed the National Banking Law. It provided for the appointment of a Comptroller of the Currency, and fixed his term of office at five years "unless sooner removed by the President, by and with the consent of the Senate." What inferences follow these statutes? And they are merely examples of many other statutes. The right of removal at pleasure conferred by the statute of 1820 was superfluous if the President had the same authority under the Constitution, and it was useless for Congress to limit the tenure of office by the one statute to four years and by the other to five years, for the President might shorten or extend them indefinitely, as he clearly can if he has the right of removal. If the President has the constitutional right of removal, it is clearly unconstitutional for

Congress to limit the right by fixing the term of office. Yet this right has been often exercised by Congress without question.

In section 1537 of 2 Story on the Constitution, third edition, the author says:

> "It is observable that the Constitution makes no mention of any power of removal by the Executive of any officers whatsoever. As, however, the tenure of office of no officers, except those in the judicial department, is, by the Constitution, provided to be during good behavior, it follows by irresistable inference that all others must hold their offices during pleasure, *unless Congress shall have given some other duration to their office.*"

Mr. Story clearly recognizes the right of Congress to fix the tenure, and that this action would defeat the right of removal. In 1 Kent's Commentaries, marginal page 310, the author, after commenting on the passage of the Act of 1789, says:

> "This amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon, as of decisive authority in the case. It applies equally to every other officer of Government appointed by the President and Senate, *whose term of duration is not specially declared.*"

In this pointed way Chancellor Kent recognized the fact that the legislative construction, as it is called (Act of 1789), is not applicable to cases where the term of office is fixed by law. It may be well

to note here that the act and debate of 1789 related to one of the "heads of departments," and not to one of the inferior offices provided for by the Constitution. It will be seen that the authorities seem to recognize the right of Congress to fix a term of office even for the heads of departments, which are offices provided for by the words of the Constitution. The debate and contention was about offices of this character. We find no judicial opinion or statements by eminent statesmen intimating that Congress has not the power to fix the term of office of the inferior officers whose offices are created by Congress under the authority conferred by the Constitution.

In *ex parte* Hennan, 13 Peters, 230, the Supreme Court of the United States clearly and distinctly recognizes the authority of Congress to fix the terms of inferior officers. That case related to the office of circuit court clerk. Instead of conferring the power of appointment of clerks upon the President and Senate, Congress conferred it on the judge, but did not fix a term of office for the clerk. The judge removed the clerk from office. The question was raised by mandamus as to whether or not the removal was legal. The court held: "No tenure of this office being prescribed by the Constitution *or laws of the United States*, it is held at the will of the appointing power and of the incumbent, and the former may remove the latter at pleasure." The argument and reasoning of the court show clearly that if Congress had fixed the tenure of the clerk's office the appointing power could not have disregarded it. The court said:

"By the Constitution of the United States, Art. 2, Sec. 2, it is provided that the President shall nominate, and by and with the advice and consent of the Senate, shall appoint certain officers therein designated, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they shall think proper, in the President alone, in the courts of law, or in the heads of departments. The appointing power here designated in the latter part of the section, was, no doubt, intended to be exercised by the department of the Government to which the officer to be appointed most appropriately belonged. The appointment of clerks of courts properly belongs to the courts of law; and that a clerk is one of the inferior officers contemplated by this provision in the Constitution cannot be questioned. * * * The Constitution is silent with respect to the power of removal from office, *where the tenure is not fixed.* It provides that the judges, both of the supreme and inferior courts, shall hold their offices during good behavior. But no tenure is fixed for the office of clerks. Congress has, by law, limited the tenure of certain officers to the term of four years. 3 Story, 1790; but expressly providing that the officers shall, within that term, be removable at pleasure; which, of course, is without requiring any cause for such removal. The clerks of courts are not included within this law, and there is no express limitation in the Constitution, or laws of Congress, upon the tenure of the office. *All offices, the tenure of which is not fixed by the Constitution or limited by law,* must be held either during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent; or must be held at the will and discretion of some department of the Government, and subject to removal at pleasure."

The court then proceeds to cite a number of analgous State cases which recognize the principle "that the power of removal was incident to the power of appointment in the absence of all constitutional or *legislative provision on the subject.*" This case and the cases cited in it show that the power of removal is not an incident of the power of appointment, when the term of office is *fixed by statute.*

In *Marbury* vs. *Madison*, 1 Cranch, 137, 162, Chief Justice Marshall said:

"Where an officer is removable at the will of the Executive, the circumstance which completes his appointment is of no concern, because the act is at any time revocable, and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the Executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed. * ** Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed; *and as the law creating the office, gave the officer a right to hold for five years,* independent of the Executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country. * * * It has been created by special act of Congress, and has been secured, so far as the laws can give security, to the person appointed to fill it, for five years."

In that case the Supreme Court held that the President had no right to withdraw the commission, or to withhold it; and, of course, it is an authority to show that the President would have had no right to remove Mr. Marbury, whose term of office was fixed at five years, after he had received his com-

mission. Senator Edmunds, after delivering his own opinion, in the impeachment trial of President Johnson, against the constitutional right of removal, refers to this case in these words: "*Marbury* vs. *Madison*, 1 Cranch, is, as I understand it, exactly in point." Impeachment of Andrew Johnson, Vol. III, page 86.

In *McAllister* vs. *United States*, 141 U. S., 188 and 189, *Marbury* vs. *Madison* is quoted with approval. In McAllister's case the right to suspend a territorial judge and to appoint his successor, by and with the advice of the Senate, is sustained by the court by authority of the statutes then in force, which constituted part of the Tenure of Office Act, and which have been repealed. The President in his letter to Ward McAllister, Jr., cited Section 1768 of the Revised Statutes as conferring the authority to suspend him from office. *Ibid*, page 192. In the course of its opinion in the case the court said: "What may be the powers of the President over territorial judges, now that Section 1768 is repealed, is a question we need not now discuss." *Ibid*, page 178. After quoting *Marbury* vs. *Madison*, the court said:

"Nothing in those observations militates, in any degree, against the views we have expressed. On the contrary, the chief justice asserted the authority of Congress to *fix the term* of a Justice of the Peace in the District of Columbia beyond the power of the President to lessen it by his removal, or by withholding his commission after his appointment has been made, pursuant to an act of Congress, by and with the advice and consent of the Senate, and after the commission has been

signed by the President and sealed by the Secretary of State. So, in the present case, while Congress *fixed the term* of the District Judge for Alaska at four years, and until his successor qualified, it did so without modifying, and, therefore, in view of the statute then in force, giving the President power to suspend, in his discretion, any civil officer (other than judges of the courts of the United States) appointed by him, with the advice and consent of the Senate, until the end of the next session of that body. The decision in the present case is a recognition of the complete authority of Congress over territorial offices, in virtue of 'those general powers which that body possesses over the Territories of the United States,' as *Marbury* vs. *Madison* was a recognition of the power of Congress over the term of office of a Justice of the Peace for the District of Columbia."

In the case of the *United States* vs. *Guthrie*, 17 Howard, 287, the majority of the court held that a writ of mandamus should not issue to the Secretary of the Treasury, commanding him to pay to a judge of a territory his salary for the unexpired term of the office from which he had been removed by the President and another person appointed thereto. The court decided against the authority to grant a mandamus in the case stated. McLean, Justice, believing that the court had the authority to grant the writ and was required also to consider the question of the President's power of removal. In an able opinion he held that the Constitution conferred no such power on the President. Senator Edmunds, in referring to this case, said that "the only judge, whose views of jurisdiction made it proper for him to speak, upheld the same doc-

trine," referring to the doctrine of *Marbury* vs. *Madison*. Impeachment of Andrew Johnson, Vol. III, page 86.

There is nothing in the case of *Blake* vs. *United States*, 103 U. S., 227, that is opposed to the views expressed in the preceding cases. It is there held that the President has the power to supercede or remove an officer of the army or of the navy by the appointment, by and with the advice and consent of the Senate, of his successor. The case involved no question of *a term fixed by statute*. It contains no argument that indicates a denial of the power of Congress to fix such term. On the contrary, *ex parte* Hennen is quoted approvingly to the effect that "all offices, the tenure of which is not fixed by the Constitution, *or limited by law*, must be held during good behavior," etc. The case clearly recognizes as law that the tenure of office, not fixed by the Constitution, *may be fixed by statute*.

In the case of the *United States* vs. *Avery*, reported in Deady's Report, page 204, the court discussed the exact point involved in these cases. The second head note is in these words:

"Where Congress has the power to create an office it may prescribe the term for which it shall be holden by the incumbent, and in such case there is no power of removal during such term."

After quoting with approval the opinion of Mr. Justice McLean in *United States* vs. *Guthrie*, 17 How., 284, and remarking that the majority of the court, "avoiding the decision of the main question—the power of removal—decided that the

remedy was not well taken," the judge proceeded to discuss the power of removal from a constitutional and historical standpoint. On page 212 of the report the court says:

"In the progress of time it has been found or deemed that the unqualified power of removal from office by the President works injuriously, and Congress has interfered to control and regulate the exercise of that power by the passage of what is known as 'The Tenure of Office Bill.'

"In the passage of this act by Congress it must have been assumed, and, as I think, correctly, that the Constitution left the subject of direct removals from office to be regulated by *the legislative power*. In the great debate which occurred in the Senate on this subject in 1835, Mr. Clay, Mr. Webster and Mr. Calhoun all agreed in maintaining that the Constitution did not give the President the power of removal and that the power was properly subject to legislative control and regulation.

"From Mr. Calhoun's speech on this subject I quote as follows: 'If the power to dismiss is possessed by the Executive he must hold it in one of two modes; either by an express grant of the power in the Constitution or as a power necessary and proper to execute some power expressly granted by that instrument. All the powers under the Constitution may be classed under one or the other of these heads; there is no intermediate class. The first question, then, is, has the President the power in question by an express grant in the Constitution? He who affirms he has is bound to show it. That instrument is in the hands of every member; the portion containing the delegation of power to the President is short; it is comprised in a few sentences. I ask the Senators to open the Constitution, to examine it and find, if they can, any authority of the President to dismiss any public

officer. None such can be found, the Constitution has been carefully examined and no one pretends to have found such a grant. Well, then, as there is none such, if it exists at all it must be as a power necessary and proper to execute some granted power; but if it exists in that character it belongs to Congress and not to the Executive. I venture not the assertion hastily; I speak on the authority of the Constitution itself—an express equivocal authority which cannot be denied or contradicted. Hear what that sacred instrument says: 'Congress shall have the power to make all laws which shall be necessary and proper for carrying to execution the foregoing powers (those granted to Congress itself) and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.' Mark the fullness of expression. Congress shall have power to make all law, not only to carry into effect the powers exclusively delegated to itself, but those delegated to the Government or any department or officer thereof; comprehending, of course, the power to pass laws necessary and proper to carry into effect the powers expressly granted to the executive department. It follows that to whatever grant of power to the Executive the power of dismissal may be supposed to attach; whether to that of seeing the laws faithfully executed or to the still more comprehensive grant, as contended for by some, vesting executive power in the President, the mere fact that it is a power appurtenant to another power and necessary to carry it into effect transfers it by the provisions of the Constitution cited from the Executive to Congress, and places it under its control to be regulated in the manner which it may judge best.

"Such are the arguments by which I have been forced to conclude that the power of dismissing is not lodged in the President but is subject to be

controlled and regulated by Congress. I say forced, because I have been compelled to the conclusion in spite of my previous impressions, relying on the early decision of the question and the long acquiescence in that decision."

Continuing on page 214 of the report, Judge Deady says:

"To the force of this argument I think nothing can be added. It amounts to demonstration. The power is with Congress to regulate the removals from office."

We deny that there has been any practice or usage that applies to offices with *fixed terms* that shows a right of removal in the President. Such power has been exercised under statutes; and also in cases where no term was fixed. Such practice or usage, if it existed, would not control the courts.

"If the courts recognize executive decision and practice as authoritative on them in construing the Constitution, they may abdicate one of their most important duties, and lessen their power to check all violations of the Constitution by any department of the Government, legislative, executive, or judicial." *In re Yancy*, 28 Fed. Rep., 452.

In *United States* vs. *Kirkpatrick*, 9 Wheaton, 720, Story, J., said: "But whatever weight the practice of the Government may be entitled to, in cases of doubtful construction, it can have no influence to change the clear language of the law."

The impeachment trial of President Johnson has been fitly termed the trial of the Constitution.

One of the articles of impeachment charged the President with unlawfully removing Edwin M. Stanton from the office of Secretary of War. By the terms of Mr. Stanton's commission he held the office "during the pleasure of the President of the United States for the time being." His removal occurred while the Tenure of Office Act was in force. The President, in his answer to the articles of impeachment, claimed that he had the constitutional right to remove Stanton, and claimed also that the Tenure of Office Act, which sought to limit the right of removal, was unconstitutional. The question as to whether the Constitution conferred the right of removal on the President was considered by the Senators who filed opinions in the case.

Senator Sherman said:

"Surely when these express powers, far less important, are so carefully limited by the Constitution, an implied power to remove at pleasure the multitude of officers created by law cannot be inferred from that instrument. If so, the implied power swallows up and overshadows all that are expressly given. What need he care for the Senate when he may remove in a moment, without cause, all officers appointed with their consent? What need he care for the law when all the officers of the law are instruments of his will, holding office, not under the tenure of the law, but at his pleasure alone? The logical effect of this power, if admitted to exist under and by virtue of the Constitution, is revolution." Impeachment of Andrew Johnson, Vol. III, page 6.

Senator Howard said:

"The doctrine, asserted broadly and unconditionally in Mr. Johnson's answer, that he has, as a separate and independent power under the Constitution, the power of removal, leads to most fatal consequences. It directly subverts the popular character of the Government." Page 35.

Senator Howe said:

"This power of removal is, then, not vested in the President by anything said in the Constitution nor by anything properly implied from what is said. It seems to me, on the contrary, it is postively denied by the manifest purpose of the Constitution. * * * My conclusion is that the President derives no authority from the Constitution to dismiss an officer from the public service." Pages 63–65.

Senator Yates said:

"The provision that the 'President shall have power to fill all vacancies during the recess of the Senate by granting commissions which shall expire at the end of the next session,' excludes the conclusion that he may create vacancies and fill them during the session and without the concurrence of the Senate. If this view is not correct, it would seem that the whole provision of the Constitution on this point is meaningless and absurd." Pages 103–104.

Senator Sumner said:

"The dilemma is this: If the President can remove Mr. Stanton during the session of the Senate without any power by statute, it is only by virture of a perogative vested in him by the Constitution, which must necessarily override the Tenure of Office Act as an unconstitutional effort to abridge it. If,

on the other hand, this act is constitutional, the perogative of removal is not in the President and he violated the Constitution when he assumed to exercise it. The Tenure of Office Act cannot be treated otherwise than constitutional." Page 268.

Senator Morrill, of Vermont, said:

"It is true the President may temporarily fill vacancies which happen during the recess of the Senate, but it is going too far to assume that he may first do an act not allowed by the Constitution, in order to open the door so that he may do another thing which is allowed; that he may empty under the power only to fill; or that he may make a vacancy to happen with a view to an exercise of the power to fill a vacancy. Things happen by chance—as by death, resignation, absence—not by previous contrivance. An insurance policy is valid when the ship happens to get foundered, not when it is designedly scuttled and sunk by the owner. The power to create vacanciecs at will, to fill them with A, and then to come to the Senate for advice and consent to fill them with A or with B, is an absurdity. The faithful daughter asks parental advice and consent before she gets married, not after. The power claimed by President Johnson to create vacancies at will would blot out one of the most important functions of the Senate, designed to be one of the highest safeguards of the Constitution against executive indiscretions and usurpations, as even appointments consented to during the session of the Senate, if the claim of unlimited power of removal by the President were to be tolerated, might be set aside the moment after the adjurnment of the Senate for other and different appointments never advised and never consented to by the Senate. All stability would be lost, and all officers of the Government

would hold their places at the mere will and caprice of the President. It would enthrone the one-man-power against all else. Such a power in a free Government would be neither prudent nor safe, though placed in the most scrupulous hands; and if, by chance, in other hands, it would be dangerous." Page 137.

Senator Harlan said:

"The Constitution does not anywhere in terms confer upon the President the authority to make removals; nor does it anywhere confer on him this right by necessary implication." Page 233.

Senator Patterson, after giving his own opinion against the power of the President, quoted from Webster and Clay in the debate of 1835, as follows:

"Mr. Clay said: 'It is the legislative authority which creates the office, defines its duties, and may prescribe its duration. I speak, of course, of offices not created by the Constitution, but the law. The office coming into existence by the will of Congress, the same will may provide how, and in what manner, the office and officer shall cease to exist. It may direct the conditions on which he shall hold the office, and when and how he shall be dismissed. It would be unreasonable to contend that, although Congress, in pursuance of the public good, brings the office and the officer into being and assigns their purposes, yet the President has a control over the officer which Congress cannot reach and regulate.' * * *

"The language of Mr. Webster was not less explicit or emphatic. 'I think then, sir, that the power of appointment naturally and necessarily includes the power of removal, where no limitation is expressed, nor any tenure but that at will de-

clared. The power of appointment being conferred on the President and Senate, I think the power of removal went along with it, and should have been regarded as a part of it and exercised by the same hands. I think the legislature possesses the power of regulating the condition, duration, qualification and tenure of office in all cases where the Constitution has made no express provision on the subject. I am, therefore, of opinion that it is competent for Congress to decide by law, as one qualification of the tenure of office, that the incumbent shall remain in place till the President shall remove him, for reasons to be stated to the Senate. And I am of opinion that this qualification, mild and gentle as it is, will have some affect in arresting the evils which beset the progress of the Government and seriously threaten its future prosperity.' * * *

"After considering the question again and again within the last six years, I am willing to say that, in my deliberate judgment, the original decision was wrong. Page 311."

Mr. Patterson added that Mr. Calhoun and Mr. Ewing were equally positive in their advocacy of the bill, and Marshall, Kent and Story seem to have entertained similar views in respect to the original intent of the Constitution. Page 312.

Senator Edmunds, after analyzing the debates and votes upon the Act of 1789, and showing that it was inconclusive as a construction of the Constitution, said:

"As to the supposed recognition by the laws themselves, and a practice under them, it need only be said that the whole course of legislation com-

prised in more than twenty statutes, has, until 1863, authorized the President to make removals; and hence they furnish no evidence of his powers, independently of the law, but the contrary. It needs no argument to show that what the laws have authorized they may forbid. No law can become so old that the legislative power cannot change it; and even as to legislative construction it is the same. A later Congress has just as much power in that respect as an earlier.

"The Acts of 1792, 1835, and 1863, relating to *ad interim* appointments, which have always been acquiesced in without question from any source, are decisive utterences, so far as legislative action can possibly be so, of the power of the law to regulate the exercise of powers and duties expressly conferred by the Constitution upon the President and Senate. Our own statutes and those of all states having written Constitutions, are full of similar or analagous instances.

"Can it be said, then, that where the letter of the Constitution is silent upon another branch of the same subject, the law has no power to speak, and that behind that evil of silence sleeps a kingly perogative of the President?" Pages 85, 86.

These utterances, opinions of Senators are not merely speeches; they are deliberate judgments.

On both authority and reason appellant was entitled to retain his office. The term being fixed by law, only the legislative power can shorten it. To change the statute is not within the authority of the executive or judicial departments. That the executive and judiciary are not permitted to exercise any of the legislative power is an axiom in constitutional law, and is universally recognized as a principal essential to the integity and maintenance

of the system of government ordained by the Constitution.

This alleged constitutional power of removal, it is claimed, is beyond legislative control. This position is not consistent with other parts of the Constitution. On Congress the power is conferred in express terms. "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof." Article 1, section 8.

To say that the President can remove an incumbent with a fixed term from his office without the direction or permission of Congress, is to affirm that he is superior in that respect and may disregard its enactments at pleasure. And more, it is to assert that Congress cannot prescribe the term of an office created by it so that the President cannot change the term. It is to assert that the President can regulate the powers conferred on Congress. This would be to reverse the meaning of the Constitution. If he is permitted to annul a statute, why not permit him to annul the Constitution? If today he may remove the district attorneys, to-morrow he may remove the judges. The tenure of the former is fixed by statutes made by authority of the Constitution. The tenure of the latter is fixed by the Constitution itself. The one tenure is as binding on the Executive as the other. If he may annul a statute, why not the Constitution? Unlawful power, not checked, grows, and there is but little progress in its evolution from an-

nulling a statute to annulling the Constitution. Unbending vigilance of the courts is the price of a perpetual Constitution.

The letter of the Constitution authorizes Congress to create these offices. It did create them. The very letter of the Constitution authorized Congress to say, if it chose, that the incumbents should be appointed by the head of a department or by the courts of law. Congress, in fact, has provided that in some cases vacancies in them may be filled by the Circuit Justice. R. S., Sec. 793. If these things are true, and they are in the plain English of the Constitution, how is it possible to maintain that there is somewhere hidden between the lines of the Constitution a power in the President that annuls these plain provisions and that vests in him a kingly prerogative? No court has decided that he has this power, and distinguished statesmen, partial to Presidential power, have claimed it for him only in the absence of statutes fixing the tenure of office. The doctrine of legislation by proclamation, or the annulling of statutes by personal letters, has no place in this republic. It has no place at common law under the unwritten Constitution of the mother country.

In 1613, Edward Coke, Chief Justice of England, said to King James: "The King, by his proclamation, or otherwise, cannot change any part of the common law or statute law." * * *

King James:

"My Lords, I always thought, and by my soul I have often heard the boast, that your English law

was founded upon reason. If that be so, why have not I and others reason as well as you, the judges?"

Coke, C. J.:

"True it is, please your Majesty, that God has endowed your Majesty with excellent science as well as great gifts of nature; but your Majesty will allow me to say, with all reverence, that you are not learned in the laws of this, your realm of England. * * * The law is the golden metwand and measure to try the causes of your Majesty's subjects, and it is by the law that your Majesty is protected in safety and peace."

King James (in a great rage): "Then I am to be under the law—which it is treason to affirm."

Coke, C. J.: "Thus wrote Bracton, '*Rex non debet esse sub homine, sed sub Deo et lege*:"

The President ought not to be subject to man, but be governed by God and law.

The law gives District Attorneys a tenure of four years, and it does not give the President the right of removal.

If the law is wrong the remedy is with Congress.

We submit that the judgment of the Court of Claims should be reversed.

J. H. PARSONS, JR.,
D. D. SHELBY,
W. W. DUDLEY,
L. T. MICHENER,
R. R. MCMAHON,
Attorneys for Appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1896.

LEWIS E. PARSONS, JR., *Appellant*,
vs.
THE UNITED STATES.
No. 270.

APPEAL FROM THE COURT OF CLAIMS.

Appellant's Supplemental Brief.

J. H. PARSONS, Jr.,
D. D. SHELBY,
DUDLEY & MICHENER,
R. R. MCMAHON,
Attorneys for Appellant.

H. T. ELLIOTT, PR.

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The Assistant Attorney General does not seem to comprehend our position, which may be briefly stated thus: The President has not the power to remove an officer whose *term is prescribed by law*, or "specially declared," as Chancellor Kent put it. With this proposition firmly fixed in mind, we ask the attention of the court to the following additional suggestions.

I.

Legislative Interpretation.

1. The authors of the Federalist had denied to the President the power to remove an officer without the consent of the Senate, they holding that the dismissing power was appurtenant to the appointing power. See No. 77 of the Federalist. But this view was soon to be challenged.

In the Congress of the United States, in the year 1789, a bill was pending to establish an executive department to be denominated, "The Department of Foreign Affairs." The first clause, after providing for the appointment of the head of the department, contained these words, "to be removable from office by the President of the United States."

In 4 Elliott's Debates, pp. 335–407, is an account of the famous debate on the motion to strike out the words above quoted, in which it was declared, again and again, that though the President might have the power to remove an officer if the office had no fixed term of duration, yet he would not have that power concerning a statutory office with a fixed term.

Mr. Madison said that the doctrine which seemed to stand most in opposition to the principle he contended for, is that the power to annul an appointment is in the nature of things incidental to the power which makes the appointment. 4 Elliott's Debates, 374.

He then argued that the President had the constitutional right to remove his appointees without the advice and consent of the Senate, and concluded his argument with the assertion that the clause was constitutional, and expressed the meaning of the constitution. *Ibid.* p. 379.

The vote in the house on the motion was yeas, 20 and nays, 34. *Ibid.* p. 407.

In the Senate, the same motion was made and it was decided in the negative, Vice-President Adams casting the decisive vote. Senate Journal, 1789 to 1793, p. 42, under date of July 18, 1789.

For the views of those who differed with Mr. Madison in the House, see the remarks of Mr. Livermore, pp. 354, 355, 398; Mr. Lawrence, pp. 360, 361; Mr. Sherman, p. 369, and Mr. Smith, p. 401. This is the debate spoken of by historians and commentators as the one in which it was first declared that the President had the power to remove all officers without first obtaining the consent of the Senate. But the fact should be noted that the doctrine thus declared did not include officers whose term is specially declared or fixed by law. Though the minority were defeated, their view lived, and from that time to this it has been repeatedly urged in debate and crystallized into the form of legislation.

In 1826 and in 1835, earnest efforts were made to repeal the Act of 1820. See 12 Benton's Debates, pp. 544, 584 *et seq.* January 6, 1835, the matter was referred to a select committee in the Senate consisting of Calhoun, Southard, Bibb, Webster, Benton and King. *Ibid.* 544.

February 6, 1835, Mr. Calhoun made a report which was agreed to by all the members of the committee except Mr. Benton. *Ibid.* 584. The debate was participated in by the ablest men in the Senate and the view that the Congress had the power to legislate on the subject of removals and appointments was supported by Calhoun, Poindexter, Southard, Bibb, Clay, Webster and Preston, and opposed by Benton, Kain, Buchanan, Shepley and Wright. *Ibid.* pp. 584–621.

Not only has it been debated thus, but Congress has repeatedly exercised the right of restricting or

denying the President's power of removal. A number of instances may be cited:

a. Marshals shall be appointed for a term of four years; R. S. Sec. 79.

b. The Surveyor General is to hold his office four years from the date of commission, "unless sooner vacated by death, resignation, or removal from office;" R. S. Sec. 2,217.

c. Registers and Receivers shall be appointed for the term of four years, but shall be removable at pleasure; R. S. Sec. 2,244.

d. Postmasters "shall be appointed and may be removed by the President, by and with the advice of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law;" R. S. Sec. 3,830.

e. Governors and secretaries of territories hold four years, "unless sooner removed by the President;" R. S. Sec. 1,842, 1,843.

f. Collectors of Customs, Naval Officers, and Surveyors of the Customs are appointed for the term of four years; R. S. Sec. 2,613.

g. The chiefs of the several bureaus in the Navy Department are appointed by the President, by and with the advice and consent of the Senate, and "shall hold their offices for the term of four years;" R. S. Sec. 421. The Solicitor General held that this statute gave the appointee a four-year's term; 16 Op. 656.

h. The Commissioners of the District of Columbia hold for an official term of three years, under the act of June 11, 1878; Opinion of Attorney-General Devins, 16 Op. 537.

i. The Comptroller of the Currency is appointed by the President, by and with the advice and consent of the Senate, "and shall hold his office for the term of five years, unless sooner removed by the President, upon reasons to be communicated by him to the Senate;" R. S. Sec. 325.

Thus we have a great variety of legislation, the constitutionality of which has not been assailed either in the executive departments or in the courts. These acts of Congress, some of them granting to the President the right of removal, others limiting it, and others by necessary implication denying it for a fixed and definite term, were all approved by Presidents of the United States, and have all been obeyed and enforced.

j. In addition to these varying enactments, we have the Tenure of Office act, passed in 1867 (R. S. Secs. 1767–1775 inclusive), which provided for suspension and removal from office, appointments and the filling of vacancies, and in a way totally at variance with the view that the President had the absolute power to remove an officer, with a fixed term of office, without the consent of the Senate. In 12 Op. 443, 446, Attorney-General Evarts said that the purpose of this act was to change the doctrine and practice of the Government, by which an officer might be removed at the discretion of the President. This act was enforced for twenty years, and then repealed.

k. Next in order is the act to regulate and improve the Civil Service of the United States, approved January 16, 1883; 22 Stat. 403, 1 Supp. R. S. 392. The President is authorized to appoint three Com-

missioners, but no term of office is prescribed, and it is expressly declared that "the President may remove any Commissioner; and any vacancy in the position of Commissioner shall be so filled by the President, by and with the advice and consent of the Senate." * * * It is difficult to imagine a wider scope of legislative territory than has been occupied by the Congress in dealing with the subject of office holding, and we do not see how at this late day, the power of Congress to fix an official term, and to either limit the right of removal, or deny it altogether, can be seriously questioned.

2. In the early history of our Government, the office of District Attorney had no fixed term, and the statute was silent as to the power of removal. At that time commissions were issued, authorizing the incumbent "to hold the office during the pleasure of the President." Attorney-General Wirt, 1 Op. 212, justified this phraseology in a commission, because the failure to fix a definite term implied that Congress intended a holding at the pleasure of the President, and he said whenever Congress intended to fix a more permanent tenure they took care to express that intention clearly and explicitly. In the case at bar, this intention was clearly and explicitly set forth.

In 4 Op. 603-612, Attorney-General Clifford, in a very able opinion, held that officers are removable at the pleasure of the President in all cases where the term of office is not specially declared, and he quotes with approval the language of Mr. Justice Thompson, in *ex parte* Hennen, 13 Peters 259, and of Chancellor Kent in 1 Kent's Commentaries 310,

holding that in the absence of constitutional or statutory provisions, the power of removal is incident to the power of appointment, *except where the term of duration is specially declared.*

As we have seen, Congress has repeatedly fixed the duration of the terms of office by special declaration, yet, if the view of the Assistant Attorney General is sound, Congress had no power to do anything of the sort, and such enactments were absolutely unconstitutional. It must be apparent that if the President, as an incident of the power of appointment or in the discharge of the executive duties imposed upon him by the Constitution, has the power to remove an officer whenever he pleases, all officers whose terms are not prescribed by the Constitution hold at the pleasure of the President, and so holding they are to be removed, not by the operation of a statute fixing an end to the term, but by the affirmative action of the President himself. According to the view of the Assistant Attorney General, the will of the President is supreme, except as to the officers specially designated in the Constitution itself, and he has supreme power of removal except as to the judges of the courts. If that be true it is simply an exhibition of legislative folly to enact statutes prescribing that officials shall have fixed and definite terms, at the expiration of which their occupations must cease.

Yet this court took a different view in *U. S.* v. *Irving*, 1 How. 250, which was an action brought on the bond of Swartwout, late collector of the customs at New York City. He was appointed to that office May 1, 1829, and continued to serve under

such appointment until the 28th of March ensuing. On the 29th of March, 1830, his nomination was sanctioned by the Senate, and he continued to serve in the office of collector four years. On the 29th of March, 1834, he was again appointed by the President and Senate for the term of four years. Under each of the appointments he gave bond and security for the faithful discharge of the duties of the office. At the commencement of his second term, a large balance was charged against him arising under the previous term; and at the commencement of the third term, a balance was charged as arising under the second term. McLean, justice, in passing upon the questions involved, said:

"By the Act of May 15, 1820, the term of appointment of Collectors of the Customs and other offices named was limited to four years. Prior to that act such appointments were made without any limitation as to time, except the pleasure of the President" * * * "Under the Act of 1820, Collectors can only be appointed for four years. At the end of this term the office becomes vacant, and must be filled by a new appointment."

Page 258.

It will be noticed that the Act of May 15, 1820, cited by Mr. Justice McLean, is the act which fixed the term of District Attorneys at four years. This Court clearly understood that the Act of May 15, 1820, changed the previous condition of things by making that fixed and certain which before was as indefinite as "the pleasure of the President" can be, and yet this view is necessarily antagonized by the Assistant Attorney General in his conten-

tion for the supreme and absolute power of the President to remove all appointees, except judicial officers. In other words, the theory of the Assistant Attorney General must necessarily be carried to this extreme, that all officers, except judicial officers, hold at the pleasure of the appointing power, and that the appointing power alone can determine the duration of the term, so that that which is begun by the appointing power can only be ended by the same power. Therefore as the legislative, or the non-appointive power, cannot fix the duration of the term, he is driven to the position that Congress has no power to legislate upon the subject of the appointment, existence, or termination of offices, except to create, abolish, or change the duties and compensation of the office. The office once given by Congress, it is for the President alone to say who shall occupy it and how long. This is the doctrine of the Assistant Attorney General carried to its legitimate and inevitable conclusion, and it is one which has not been recognized by the Congress, the departments, or the courts.

In 16 Op. 537, Attorney-General Devens expressed a view wholly at variance with that contended for by the Assistant Attorney General, and argued that Congress had the power to fix the terms of office, declare when they should begin and end, and what should be done in certain contingencies.

Again, Solicitor-General Phillips, a distinguished lawyer, in 16 Op. 656, said:

"*The law of the term of the office, of course, controls special language in the nomination and confirmation.*"

In 4 Op. 578, Attorney-General Clifford said:

"The language of the Appropriation Act, defining the tenure of office of the Commissions is too explicit to leave anything for construction. They were appointed for one year and no longer, and they cannot continue in office under their present commission beyond that time."

The same doctrine was asserted by Attorney-General Evarts in 12 Op. 469, and by Attorney-General Devens in 15 Op. 431, and 16 Op. 18.

And especially significant is the language of Mr. Justice Field, in his dissenting opinion in McAllister *vs.* U. S., 141 U. S., bottom of p. 199, as follows:–

"To assert that the President can remove the incumbent, or suspend him from his office, without the direction or permission of Congress, is to affirm that he is superior in that respect, and must disregard its enactments at pleasure, *and more, it is to affirm that Congress cannot prescribe the term of an office created by it, which no one would pretend.*"

Mr. Justice Gray and Mr. Justice Brown concurred in this dissenting opinion.

Yet this could not be so if the theory of the Assistant Attorney General is sound, for "the pleasure" of the appointing power would control, and the nomination, confirmation, and commission would all be for "the pleasure of the President," and not for any term named by a statute.

From 1820 on down to this time, every commission issued by a President for an office, the duration of which has been fixed by an act of Congress,

contained language limiting the holding to the statutory period. In other words, since that time the language of the statute has been followed in the commission issued by the President. Thus we have these repeated acts of Congress asserting this right to fix the tenure, and these almost innumerable acts of the President recognizing that power and confirming it in the document evidencing the title to the office and stating the length of its duration.

3. The Assistant Attorney General, in commenting upon certain decisions cited in our original brief, calls attention to the fact that they relate to territorial offices, and are predicated upon statutes passed under the authority granted to Congress by Sec. 3, Art. 4, "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." If this provision is sufficient to authorize Congress to exercise supreme control over the territories, create offices, provide for their appointment, and fix a term of office during which they shall not be removable by the appointing power, as has been held by this court, then it would seem to follow as an inevitable conclusion that Congress has the undoubted power to create civil offices, prescribe the qualifications of officers, their duties and compensation, declare who shall fill them and how, and fix the term of their duration.

By Sec. 8, Art. 1, the power was granted to Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this

Constitution in the Government of the United States, or in any department or officer thereof."

And in Art. 6, it is declared that "this Constitution and the laws of the United States which shall be made in pursance thereof, * * * shall be the supreme law of the land. *"

It is provided also by Sec. 2, Art. 2, that the President shall have the power to nominate, and by and with the advice of the Senate shall appoint, certain officers therein named, "and all other officers of the United States whose appointments are not herein otherwise provided for, *and which shall be established by law;* but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments." Thus there was granted to Congress the general power to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States, or in any department or officer thereof, and the declaration that such laws should be the supreme law of the land. Then, and in order that there might be no question concerning the power of Congress to *establish offices by law*, it was expressly declared in Sec. 2, Art. 2, that Congress should have the power to *establish offices* and vest the appointment of such officers either in the President, the courts, or the heads of departments. It is significant that the word "establish" is used in this specific grant of power. It is also used in other connections, as to establish justice, to establish a uniform law of naturalization,

to establish uniform laws on the subject of bankruptcies, to establish post roads and post offices, and establish the Constitution. We submit that there can be no doubt that the word as used in connection with offices is used in the sense of founding, creating, regulating, controlling. Construing the language of this paragraph with the other language of the Constitution quoted, it would seem to follow that these grants gave to Congress, in relation to the establishing of offices a greater power than was given to Congress in providing that it should have power to dispose of and make all needful rules and regulations respecting the territories. These laws are the supreme laws of the land, and the President is obliged to obey them and enforce them under the injunction that he shall see that the laws are faithfully executed, because under the declaration of the Constitution itself they are the supreme law of the land. They cannot be violated, either by the President or the humblest citizen.

II.

"Vacancies that may Happen."

The President is authorized by the Constitution to fill up "all vacancies that may happen" during the recess of the Senate.

In 1 Op. 631, Attorney-General Wirt held that the words "may happen during the recess" were equivalent to "may happen to exist during the recess," and he said that the most natural sense of the word *happen* is "to chance—to fall out—to take place by accident." And then he said:

"Now, if we interpret the word '*happen*' as being merely equivalent to 'happen to exist' (as I think we may legitimately do), then all vacancies which, from any casuality, happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the President; and the whole purpose of the constitution is completely accomplished."

And in 2 Op. 525, 528, the question was considered by Attorney-General Taney, who said that the clause quoted "was intended to provide for those vacancies which might arise from accident and the contingencies to which human affairs must always be liable. And if it falls out that, from death, inadvertence, or mistake, an office required by law to be filled is, in the recess, found to be vacant, then a vacancy has happened during the recess, and the President may fill it." This appears to be the common sense and natural import of the words used. They mean the same thing as if the constitution had said, "if there happen to be any vacancies during the recess." The framers of the constitution had provided for filling the offices with the concurrence of the Senate; but, foreseeing that, from the various casualities to which human concerns are exposed, vacancies would be found during the recess, they give power to fill them until an opportunity can be afforded of bringing the appointments before the Senate; and they use words which denote the character of the vacancies which they foresee may occur, and for which they are providing. He may fill up vacancies which may "happen" during the recess. But vacancies are

not *designedly* to be kept open by the President until the recess, for the purpose of avoiding the control of the Senate. And the word "happen" is used to describe the class and kind of vacancies, and not the particular time at which they took place.

Attorney-General Evarts held, 12 Op. 449, endorsing the opinion of Attorney-General Wirt (reported in Op. 633), that the Constitution covered "all vacancies that from *any casualty happen to exist* at a time when the Senate cannot be consulted as to filling them." The whole subject was discussed at great length by Attorney-General Devins in 16 Op. 522, in which the opinions of his predecessors were reviewed and approved.

It is a noticeable fact that in none of these cases had the President *created the vacancy* by removing an officer when the Senate was not in session, as in the case at bar. Here the vacancy was made; it did not happen as a casualty, or accident, or unavoidable circumstance.

III.

Power of Removal not Granted.

In Mechem on Public Offices, sec. 445, it is said that "if the tenure is fixed by law * * * the appointing power cannot arbitrarily remove him," citing;

Collins *vs.* Tracey, 36 Tex. 546;
Keenan *vs.* Percy, 24 Tex. 253;
People *vs.* Hill, 7 Cal. 97;
State *vs.* Chatburn, 63, Iowa, 659;
Same case, 50 Am. Rep. 760.

IV.

Salary Incident to Title.

The salary annexed to a public office is incident to the title and not to its use or occupation.

People *vs.* Oulton, 28 Cal., 51;
Dorsey *vs.* Smith, 28 Cal., 25.

V.

A Correction.

On p. 29 of the appellee's brief it is said:

"For anything that appears in this record, it may be that never before was there a district attorney whose partizanship was such as to obstruct him in aiding his chief. It should be noted, however, that there is no evidence or suggestion anywhere that the appellant himself was removed for political reasons; that is an assumption by him not creditable to his modesty." Where is this assuption? Why this inferential assault on the appellant?

J. H. PARSONS, Jr.,
D. D. SHELBY,
DUDLEY & MICHNER,
R. R. MCMAHON,
Attorneys for Appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1896.

LEWIS E. PARSONS, JR., APPELLANT,
v.
THE UNITED STATES, APPELLEE.
} No. 270.

BRIEF FOR APPELLEE.

JOSHUA ERIC DODGE,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1896.

LEWIS E. PARSONS, JR., APPELLANT,
v.
THE UNITED STATES, APPELLEE,
} No. 270.

BRIEF FOR APPELLEE.

STATEMENT.

The material elements of fact here involved are that the appellant was commissioned as United States district attorney for the northern district of Alabama on February 4, 1890; that on May 26, 1893, he was removed by the order of the President, the Senate not then being in session, and Emmet O'Neal was appointed to succeed him. On August 22, 1893, Emmet O'Neal having been nominated to the Senate, his appointment was confirmed and consented to by that body and he commissioned as United States district attorney for four years. Appellant's commission, which bore date February 4, 1890, was in the usual language for a term of four years from that date, subject to the conditions prescribed by law.

Appellant sues for the official fees earned by his successor during the calendar year 1893. The Court of Claims dismissed the petition on the ground that the claimant was duly removed from office on May 26, and, therefore, was not United States district attorney. No cause for removal was assigned by the President, and no charges of official misconduct were communicated to the claimant.

ARGUMENT.

In 1820 district attorneys and many officers were limited to four-year terms, subject to "removal at pleasure."

In 1867 the tenure-of-office act provided that removals should thereafter be made only by the President and Senate in conjunction, except for certain suspensions.

In 1874, in the Revised Statutes, the law of 1820 was retained as to the four-year term in section 769, the "removal-at-pleasure" clause being dropped. Meanwhile the restrictions of the tenure-of-office act were generally preserved in sections 1767 to 1772.

In 1887 those sections restricting removals were repealed. Appellant's contention generally stated is, that as section 769 provides that a district attorney "shall be appointed for a term of four years," he could not have been removed within his term but for the power of removal by President and Senate contained in section 1767, which he thereby diverts from a restricting into an enabling statute.

From this he deduces that as sections 1767 and 1768 have been repealed, no power exists anywhere to remove a district attorney within the term for which appointed.

He therefore contends that neither the express order of removal made May 26, 1893, by the President, nor the appointment, with the consent of the Senate, of a successor on August 22, 1893, had any effect, but that the claimant continued to be district attorney until February 4, 1894, four years after the date of his commission.

To reach this conclusion appellant must sustain all three of the following propositions:

First. That Congress *can* take away from the President and from the President and Senate joined the power of removal of an executive officer, not inferior because appointed under the Constitution with advice and consent of the Senate.

Second. That the establishing a term of office evinces an intention to take away such removal.

Third. That by the legislation above recited, culminating in the repeal of section 1767 et seq., Congress intended to take away all such removal power.

I shall proceed to consider these positions, every one of which I believe to be untenable, in the foregoing order.

I.

THE PRESIDENT HAS POWER UNDER THE CONSTITUTION TO REMOVE EXECUTIVE OFFICERS FOR SUCH CAUSE AS HE DEEMS SUFFICIENT.

a. Original construction by Congress.

This construction of the Constitution was settled by the First Congress after one of the most comprehensive constitutional debates ever had, and has been acted on

persistently for more than a century, subject only to such degree of respect as has been paid to the so-called tenure of office act of 1867, amended in 1869, and preserved in the revision of the statutes of 1873, in section 769, of which I shall speak later.

In the First Congress a bill had been introduced creating the Department of Foreign Affairs, afterwards called Department of State, and providing for a Secretary thereof, with no prescribed limit to his term of office, and containing the words "to be removed from office by the President of the United States."

Mr. White, in the House of Representatives, first assaulted this clause on the ground that the power of removing was, under the Constitution, derived from the power of appointment, and therefore was, by the Constitution, vested in the President and Senate in conjunction. With the policy of striking these words out of the act, concurred certain other Members on the ground that the power of removal was vested nowhere by the Constitution, and therefore Congress had power in creating an office to specify as to how he might be removed, and that they considered it unwise for Congress to legislate this power into the President alone. After the debate had progressed some extent, Mr. Madison, than whom no one was recognized as better authority upon a true construction of the Constitution, developed a third proposition, and that was that the true construction of the Constitution vested the power of removal of an executive officer absolutely in the President of the United States, by virtue of the phrase "the executive power shall be vested in the President," with which,

later in debate, was connected the phrase "he shall take care that the laws be faithfully executed." (Sec. 3, Art. II.)

The debates on this question are most interesting, extending from page 455 of the first volume, Annals of Congress, on June 16, to page 585, when the final vote was taken, on June 22, and practically excluding every other subject from consideration. The motion was finally crystallized into one to strike out the phrase above quoted for the reason that it might be construed into an assumption by Congress of power to grant or withhold this authority, and instead, to add in the second clause a recognition of the existence of such authority by providing that the chief clerk of the Department should exercise the functions of the Secretary "whenever he should be removed from office by the President." (Annals, vol. 1, p. 578.) This construction of the Constitution was adopted by the House of Representatives by a vote of 31 to 19 (1st Annals, p. 585). It was concurred in by the Senate but neither the debates nor the vote have been preserved in the Annals of Congress. It is said by historians to have passed the Senate by the casting vote of the Vice-President, John Adams. (Charles Francis Adams's Life of John Adams, vol. 1, p. 450.)

The contention in favor of the legislative power to either remove from or retain in office an executive officer was most tersely stated by Mr. Sedgwick, of Massachusetts, at page 521, where he says, defining the position attacked by him—

> The power of creating offices is given to the legislature. Under this general grant the legislature

have it under their supreme decision to determine the whole organization, to affix the tenure, and declare the control. This right of determining arises, not from express words, but by natural construction. So the legislature may determine that an office may be held three, five, or seven years; to be removed by the President, the President and Senate, or the legislature, or any other person whom they might introduce into office, merely for that particular purpose.

Mr. Madison stated the other proposition in favor of the necessary power of removal in the chief executive, beyond control of the legislature or any other branch, at pages 463–464, as follows:

The Constitution affirms that the executive power shall be vested in the President. Are there exceptions to this proposition? Yes, there are. The Constitution says that, in appointing to office, the Senate shall be associated with the President, unless in the case of inferior officers, when the law shall otherwise direct. Have we a right to extend this exception? I believe not. If the Constitution has invested all executive power in the President, I venture to assert that the legislature has no right to diminish or modify his executive authority.

The question now resolves itself into this, Is the power of displacing an Executive power? I conceive that if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws. If the Constitution had not qualified the power of the President in appointing to office, by associating the Senate with him in that business, would it not be clear that he would have the right, by virtue of his Executive power, to make such appointment? Should we be authorized, in defiance of that clause

in the Constitution, "The Executive power shall be vested in a President," to unite the Senate with the President in the appointment to office? I conceive not. If it is admitted that we should not be authorized to do this, I think it may be disputed whether we have a right to associate them in removing persons from office, the one power being as much of an Executive nature as the other; and the first only is authorized by being excepted out of the general rule established by the Constitution, in these words, "the Executive power shall be vested in the President."

The judicial power is vested in a Supreme Court; but will gentlemen say the judicial power can be placed elsewhere, unless the Constitution has made an exception? The Constitution justifies the Senate in exercising a judiciary power in determining on impeachments; but can the judicial power be further blended with the powers of that body? They can not. I therefore say it is incontrovertible, if neither the legislative nor judicial powers are subjected to qualifications other than those demanded in the Constitution, that the executive powers are equally unabatable as either of the others; and inasmuch as the power of removal is of an executive nature, and not affected by any constitutional exception, it is beyond the reach of the legislative body.

Mr. White, who was one of the advocates of the theory that because the Senate concurred in the appointment, therefore that the power of removal was necessarily in the President and Senate together, a position equally antagonistic to the legislative control over removals, and equally antagonistic to the contention of the appellants here, stated his position at page 466:

I have no doubt in my mind but an officer can be removed without a public trial. I think there

> are cases in which it would be improper that his misdemeanors should be publicly known. The tranquillity and harmony of the Union might be endangered if his guilt was not secreted from the world. I have therefore no hesitation in declaring as my sentiment that the President and Senate may dismiss him.
>
> The Constitution contemplates a removal in some other way besides that by impeachment; or why is it declared in favor of the judges only that they shall hold their offices during good behavior? Does not this strongly imply that without such an exception there would have been a discretionary power in some branch of the Government to dismiss even them?

Mr. Ames, of Massachusetts, at p. 474, offers certain considerations in favor of the necessity of the existence of the power in the Chief Executive himself, and the same reasons were illustrated by many other speakers in the debate. The following are Mr. Ames's remarks:

> Does any gentleman imagine that an officer is entitled to his office as to an estate? Or does the legislature establish them for the convenience of an individual? For my part, I conceive it intended to carry into effect the purposes for which the Constitution was intended.
>
> The Executive powers are delegated to the President, with a view to have a responsible officer to superintend, control, inspect, and check the officers necessarily employed in administering the laws. The only bond between him and those he employs is the confidence he has in their integrity and talents; when that confidence ceases, the principal ought to have power to remove those whom he can no longer trust with safety. If an officer shall be guilty of

neglect or infidelity, there can be no doubt but he ought to be removed; yet there may be numerous causes for removal which do not amount to a crime. He may propose to do a mischief; but I believe the mere intention would not be cause of impeachment. He may lose the confidence of the people upon suspicion, in which case it would be improper to retain him in service; he ought to be removed at any time, when, instead of doing the greatest possible good, he is likely to do an injury to the public interest by being continued in the administration.

Upon the same line of the inadvisability of diverting this power from the President Mr. Hartley said (p. 480):

The gentleman further contends that every man has a property in his office, and ought not to be removed but for criminal conduct; he ought not to be removed for inability. I hope this doctrine will never be admitted in this country. A man when in office ought to have abilities to discharge the duties of it. If he is discovered to be unfit, he ought to be immediately removed, but not on the principles that gentleman contends for. If he has an estate in his office, his right must be purchased, and a practice like what obtains in England will be adopted here. We shall be unable to dismiss an officer without allowing him a pension for the interest he is deprived of. Such doctrine may suit a nation which is strong in proportion to the number of dependents upon the Crown, but will be very pernicious in a republic like ours.

Mr. Goodhue said (pp. 533–534):

The question on the present occasion seems to stand on nearly the same ground, whether we shall trust the power of doing good to the executive magistrate or deprive him of it for fear he may

abuse it. The Constitution has recognized three great branches of the Government, and distributed among them all the powers which are granted. I conceive, therefore, in no case whatever can any kind of construction be put to lessen the powers of either of those branches. The only security which the Constitution means to give us is to call the officers of Government to account if they abuse their powers, and not to cramp their exercise so as to make them inefficient. * * * The officer is placed under the control of the President, and it is only through him that the improper conduct of a person in a subordinate situation can be known. He therefore is the only person who can properly apply the remedy, unless, indeed, the officer's malpractices are so conspicuous as to furnish ground for impeachment; and this power, vested by the Constitution in the House of Representatives and Senate, will apply the remedy in such case if the President should neglect, or if the officer should be a favorite of his.

Mr. Madison expressed his views upon the necessity of the President's having the power of removal (p. 462) in the following words:

It is evidently the intention of the Constitution that the first magistrate should be responsible for the executive department; so far, therefore, as we do not make the officers who are to aid him in the duties of that department responsible to him he is not responsible to his country. Again, is there no danger that an officer, when he is appointed by the concurrence of the Senate, and has friends in that body, may choose, rather to risk his establishment on the favor of that branch, than rest it upon the discharge of his duties to the satisfaction of the executive branch, which is constitutionally authorized to

inspect and control his conduct? And if it should happen that the officers connect themselves with the Senate, they may mutually support each other, and for want of efficacy reduce the power of the President to a mere vapor; in which case, his responsibility would be annihilated, and the expectation of it unjust. The high executive officers, joined in cabal with the Senate, would lay the foundation of discord, and end in an assumption of the executive power, only to be removed by a revolution in the Government. I believe no principle is more clearly laid down in the Constitution than that of responsibility.

And again (p. 499):

Vest this power in the Senate jointly with the President, and you abolish at once that great principle of unity and responsibility in the executive department which was intended for the security of liberty and the public good. If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community. The chain of dependence, therefore, terminates in the supreme body, namely, in the people, who will possess besides, in aid of their original power, the decisive engine of impeachment.

Mr. Boudinot (p. 468), said:

Neither this clause (for impeachment) nor any other goes so far as to say that it shall be the only mode of removal, therefore we may proceed to inquire what the other is. Let us examine whether

it belongs to the Senate and President. Certainly, sir, there is nothing that gives the Senate this right in express terms; but they are authorized in express words to be concerned in the appointment. And does this necessarily include the power of removal? If the President complains to the Senate of the misconduct of an officer, and desires their advice and consent to the removal, what are the Senate to do? Most certainly they will inquire if the complaint is well founded. To do this they must call the officer before them to answer. Who, then, are the parties? The supreme Executive officer against his assistant. And the Senate are to sit as judges to determine whether sufficient cause of removal exits. Does not this set the Senate over the head of the President? But suppose they shall decide in favor of the officer, what a situation is the President then in, surrounded by officers with whom, by his situation, he is compelled to act, but in whom he can have no confidence, reversing the privilege given him by the Constitution, to prevent his having officers imposed upon him who do not meet his approbation?

Mr. Sedgwick said (pp. 460 and 522–3):

I apprehend, likewise, that it requires but a small share of abilities to point out certain causes for which a person ought to be removed from office without being guilty of treason, bribery, or malfeasance, and the nature of things demands that it should be so. Suppose, sir, a man becomes insane by the visitation of God and is likely to ruin our affairs; are the hands of Government to be confined from warding off the evil? Suppose a person in office not possessing the talents he was judged to have at the time of the appointment; is the error not to be corrected? Suppose he acquires vicious habits, an incurable indolence, or total neglect of the duties of his office,

which forebode mischief to the public welfare; is there no way to arrest the threatened danger? Suppose he becomes odious and unpopular by reason of the measures which he pursues (and this he may do without committing any positive offense against the law); must he preserve his office in despite of the public will? Suppose him grasping at his own aggrandizement and the elevation of his connections by every means short of the treason defined by the Constitution, hurrying your affairs to the precipice of destruction, endangering your domestic tranquillity, plundering you of the means of defense by alienating the affections of your allies and promoting the spirit of discord; is there no way suddenly to seize the worthless wretch and hurl him from the pinnacle of power? Must the tardy, tedious, desultory road, by way of impeachment, be traveled to overtake the man who, barely confining himself within the letter of the law, is employed in drawing off the vital principle of the Government? Sir, the nature of things, the great objects of society, the express objects of this Constitution, require that this thing should be otherwise.

* * * * *

If expediency is at all to be considered, gentlemen will perceive that this man is as much an instrument in the hands of the President as the pen is the instrument of the secretary in corresponding with foreign courts. If, then, the secretary of foreign affairs is the mere instrument of the President, one would suppose, on the principle of expediency, this officer should be dependent upon him. It would seem incongruous and absurd that an officer who, in the reason and nature of things, is dependent on his principal, and appointed merely to execute such business as is committed to the charge of his superior (for this business, I contend, is committed solely

to his charge), I say it would be absurd in the highest degree to continue such a person in office contrary to the will of the President, who is responsible that the business be conducted with propriety and for the general interest of the nation. The President is made responsible; and shall he not judge of the talents, abilities, and integrity of his instruments? Will you depend on a man who has imposed upon the President, and continue him in office when he is evidently disqualified, unless he can be removed by impeachment? If this idea should prevail, which God forbid, what would be the result? Suppose even that he should be removable by and with the advice and consent of the Senate, what a wretched situation might not our public councils be involved in! Suppose the President has a secretary, in whom he discovers a great degree of ignorance, or a total incapacity to conduct the business he has assigned him; suppose him inimical to the President, or suppose any of the great variety of cases which would be good cause for removal, and impress the propriety of such a measure strongly on the mind of the President, without any other evidence than what exists in his own ideas, from a contemplation of the man's conduct and character day by day—what, let me ask, is to be the consequence if the Senate are to be applied to? If they are to do anything in this business, I presume they are to deliberate, because they are to advise and consent. If they are to deliberate, you put them between the officer and the President. They are then to inquire into the causes of removal; the President must produce his testimony. How is the question to be investigated? Because, I presume, there must be some rational rule for conducting this business. Is the President to be sworn to declare the whole truth, and to bring forward facts, or are they to

admit suspicion as testimony, or is the word of the President to be taken at all events? If so, this check isn ot of the least efficacy in nature. But if proof be necessary, what is then the consequence? Why, in nine cases out of ten, where the case is very clear to the mind of the President that the man ought to be removed, the effect can not be produced, because it is absolutely impossible to produce the necessary evidence. Are the Senate to proceed without evidence? Some gentlemen contend not. Then the object will be lost. Shall a man, under these circumstances, be saddled upon the President who has been appointed for no other purpose but to aid the President in performing certain duties? Shall he be continued, I ask again, against the will of the President? If he is, where is the responsibility? Are you to look for it in the President, who has no control over the officer, no power to remove him if he acts unfeelingly or unfaithfully? Without you make him responsible, you weaken and destroy the strength and beauty of your system. What is to be done in cases which can only be known from a long acquaintance with the conduct of an officer? But so much has been said on this subject that I will add no further observations upon it.

b. Subsequent recognition of conclusiveness of this decision.

The construction thus declared by Congress in 1789 has been recognized by text writers and commentators ever since, and that construction is that the Constitution vested in the President, as the Chief Executive, *all executive power*, except for the express qualification requiring a consent by the Senate to the making of treaties and to certain appointments. That among the most necessary of the executive powers so conferred is that of removal

from office of an executive officer, for any reason sufficient in the judgment of the Chief Executive to render his retention in office unadvisable.

In 1800, President Adams, who had cast the deciding vote in the Senate upon the adoption of this Constitution, indicated his understanding of his functions thereunder by an order addressed to the Secretary of State in the following words:

PHILADELPHIA, *May 12, 1800.*

SIR: Divers causes and considerations essential to the administration of the Government, in my judgment requiring a change in the Department of State, you are hereby discharged from any further service as Secretary of State.

JOHN ADAMS,
President of the United States.

Story, in his Commentaries on the Constitution, asserts the establishment of the construction of the Constitution by this legislative action and the concurrence therein of all branches of the Government, as well as of the people themselves, continuously to the time when he wrote.

Chief Justice Marshall, in his Life of Washington (vol. 2, p. 162, Philadelphia edition), wrote: "As the bill passed into a law, it has ever been considered as a full expression of the sense of the legislature on this important part of the Constitution."

Chancellor Kent, in his famous commentaries (p. 310 of vol. 1), comments as follows:

This amounted to a legislative construction of the Constitution, and it has ever since been acquiesced

> in and acted upon as of decisive authority in the case. It applies equally to every other officer of the Government appointed by the President and Senate whose term of duration is not specifically declared. It is supported by the weighty reason that the subordinate officers in the executive departments ought to hold at the pleasure of the head of that department, because he is invested generally with the executive authority, and every participation in that authority by the Senate was an exception to a general principle, and ought to be taken strictly. The President is the great responsible officer for the faithful execution of the law, and the power of removal was incidental to that duty, and might often be requisite to fulfill it.

Hon. William M. Evarts, who has occupied the distinguished public positions of Senator, Attorney-General, and Secretary of State, in his famous argument upon the impeachment of Andrew Johnson, summarizes the force and effect of the decision reached by Congress in 1789, and of the practical adoption thereof, not only by the various branches of the Government, but by the whole people of the United States, in so comprehensive a manner that I can not do better than quote his words at some length. They are found at pages 314 and 315 of volume 2 of the report of the impeachment trial, and are as follows:

> What, then, is the test of the consideration? Whether removal from office belongs to the executive power, if the Constitution has not attributed it elsewhere; and then the question was of statesmanship, whether this debate was important, whether it was vital, whether its determination one way or the

other did affect seriously the character of the Government and its working, and I think all agreed that it did; and all so agreeing and all coming to the resolution I have stated, what weight, what significance is there in the fact that the party that was defeated in the argument submitted to the conclusion and to the practice of the Government under it and did not raise a voice or take a vote in derogation of it during the whole course of the Government?

But it does not stand upon this. After forty-five years' working of this system, between the years 1830 and 1835, the great party exacerbations between the Democracy, under the lead of General Jackson, and the Whigs, under the mastery of the eminent men that then filled these halls, the only survivor of whom, eminent then himself and eminent ever since, now does me the honor to listen to my remarks (referring to Hon. Thomas Ewing, of Ohio)—then, under that antagonism, there was renewed the great debate. And what was the measure which the contesting party, under the influence of party spirit, brought the matter to? Mr. Webster said that while he led the forces in a great array, which, perhaps, for the single instance combined the triumvirate of himself, Mr. Calhoun, and Mr. Clay, that the contrary opinion and the contrary practice was settled. He said: "I regard it as a settled point; settled by construction, settled by precedent, settled by the practice of the Government, settled by legislation;" and he did not seek to disturb it. He knew the force of those forty-five years—the whole existence of the nation under its Constitution—upon a question of that kind, and he sought only to interpose a moral restraint upon the President in requiring him, when he removed from office, to assign the reasons of the removal.

General Jackson and the Democratic party met the point promptly with firmness and with thoroughness, and in his protest against a resolution which the Senate had adopted in 1834, I think, that his action in the removal of Mr. Duane (though they brought it down finally, I believe, to the point of the removal of the deposits) had been in derogation of the Constitution and the laws, he met it with a defiance in his protest which brought two great topics of debate up—one the independence of the Executive in its right to judge of constitutional questions, and the other the great point that the conferring by choice of the people upon the President of their representation through federal numbers was an important part of the Constitution, and that he was not a man of his own will, but endued and reenforced by the will of the people. That debate was carried on, and that debate was determined by the Senate passing a vote which enacted its opinion that his conduct had been in derogation of the Constitution and the law; and on this very point a reference was made to the common master of them all, the people of the United States; and upon a reelection of General Jackson, and upon a confirmation of opinion from the people themselves, they in their primary capacity acting through the authentic changes of their Government, by election, brought into the Senate upon this challenge, a majority that expunged the resolution censuring the action of the Executive. You talk about power to decide constitutional questions by Congress, power to decide them by the Supreme Court, power to decide them by the Executive. I show you the superior power of all that has been drawn into the great debate, of public opinion, and the determination of the suffrage; and I say that the history of free countries, the history of popular liberty, the history of the power of the people, not by

passion or by violence, but by reason, by discretion, and peaceful, silent, patient exercise of their power, was never shown more distinctly, and more definitely, than on this very matter, whether it is a part of the executive power of this country, or of the legislative or senatorial power, that removal from office should remain in the Executive or be distributed among the senators. It was not my party that was pleased or that was triumphant, but of the fact of what the people thought there was not any doubt, and there never has been since until the new situation has produced new interests and resulted in new conclusions.

In 1839 this court, speaking by Mr. Justice Thompson, in the case of *ex parte* Hennen (13 Pet., 139), declares its understanding of the construction so adopted:

> No one denied the power of the President and Senate jointly to remove where the tenure of the office was not fixed *by the Constitution*, which was a full recognition of the principle that the power of removal was incident to the power of appointment; but it was very early adopted *as a practical construction of the Constitution*, that this power was vested in the President alone, and such would appear to have been the legislative construction of the Constitution, for in the organization of the three great Departments of State, War, and Treasury in the year 1789 provision is made for the appointment of a subordinate officer by the head of the Department, who should have the charge and custody of the records, books, and papers appertaining to the office when the head of the Department should be removed from office by the President of the United States. When the Navy Department was established, in the year 1798, provision is made for the charge and custody of the

> books, records, and documents of the Department in case of vacancy in the office of Secretary by removal or otherwise. It is not here said "by removal by the President," as is done with respect to the heads of the other Departments, yet there can be no doubt that he holds his office by the same tenure as the other Secretaries, and is removable by the President. *The change of phraseology arose probably from its having become the settled and well-understood construction of the Constitution that the power of removal was vested in the President alone in such cases, although the appointment of the officer was by the President and Senate.*

In *United States* v. *Guthrie*, 17 How., 284, 307, Mr. Justice McLean, who dissented and held against the power of the President to remove the chief justice of the Territory, and who throughout his opinion evinced a strong aversion to the theory of a presidential power to remove at all, says, however, with reference to the power of the President to remove executive officers:

> But this power of removal has been, perhaps, too long established and exercised to be now questioned. The voluntary action of the Senate and the President would be necessary to change the practice, and as this would require the relinquishment of a power by one of the parties, to be exercised in conjunction with the other, it can scarcely be expected.

Mr. Justice McLean then goes on to express his opinion that this power does not extend to *judicial* offices, and that the territorial judges are judicial, a suggestion which strikes me with much force.

The language above quoted from In re Hennen was ratified by this court in *Blake* v. *United States*, 103 U. S.,

227, 231, and several opinions of Attorneys-General, some of which we shall quote from hereafter, were cited with apparent approval, and it was said in a quotation from an opinion of Attorney-General Cushing, at page 233:

> The power [of removal by the President] has been exercised in many cases with approbation, expressed or implied of the Senate, and without challenge by any legislative act of Congress.

The court then proceeds:

> Such was the established practice in the executive departments, and such the recognized power of the President up to the passage of the act of July 17, 1862.

The court in that case expressly declined to consider the constitutional power of Congress to restrict the power of the President, but held that in defiance of the words of the statute they would construe the act as not intended to forbid a removal by the President and Senate in conjunction, because such an intent would be violative of the Constitution. It was not decided whether the statute would have been valid or invalid in attempting to tie the hands of the President, for there had been in that case no removal by him. The court also pointed out the peculiar circumstances under which the act restricting the President in his power of removal of army officers, together with the tenure of office act of 1867, and the act interfering with the President's control and management of the Army as Commander in Chief thereof, were all passed, to which we shall have occasion to refer hereafter.

The constitutional character of the power of removal in the Chief Executive was also often considered by the Attorneys-General, and the weight of their opinions is to be added to that of the statesmen and of the courts above set forth.

Attorney-General Legare in 1842, advising as to the power of the President to dismiss a naval officer, said (4 Op., 1):

> Whatever I might have thought of the power of removal from office, if the subject were *res integra*, it is now too late to dispute the settled construction of 1789. It is, according to that construction, from the very nature of executive power, absolute in the President, subject only to his responsibility to the country (his constituent) for a breach of such a vast and solemn trust. (3 Story's Com. on the Constitution, 397, sec. 1538.)

In 1847 Attorney-General Clifford, who afterwards adorned the Supreme Bench, advising as to the power of the President to remove Naval Surgeon Du Barry, said (4 Op., 609):

> The power was finally affirmed to be in the President alone by a majority of both Houses of Congress, after great deliberation, and perhaps one of the ablest discussions in the history of the country. (4 Elliott's Debates, 350, 404.) That decision was acquiesced in at the time, and has since received the sanction of every department of the Government. It is worthy of special remark that several commentators on the Constitution who do not entirely admit the correctness of the construction adopted are nevertheless constrained to regard the question as closed. Mr. Justice Story, after reciting

the arguments on both sides, remarks: "If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, perhaps impracticable, after forty years' experience, to recall the practice to the correct theory." (3 Story, sec. 1538.) The remarks of Chancellor Kent are still more decisive on this point. He says: "It may now be considered as firmly and definitively settled; and there is good sense and practical utility in the construction." (1 Kent, 311.)

The authority of the President in this respect was sustained in the debate of 1789 upon the ground that "it resulted from the nature of the power and the convenience and even necessity of its exercise; that it was clearly in its nature a part of the executive power, and was indispensable for a due execution of the laws and a regular administration of the public affairs." This doctrine has since been expressly sanctioned by the unanimous judgment of the Supreme Court, placing it, however, more distinctly on the ground that, as a necessary rule, "the power of removal is an incident of the power of appointment." (13 Pet., 259.)

Attorney-General Cushing in 1851, advising as to the power of the President to remove the chief justice of Minnesota, who, by the way, had been commissioned for a statutory term of four years, made most absolute by the act creating the office (9 Stats., 403, 409), said (5 Op., 288, 290):

> Being civil officers, appointed by the President, by and with the advice and consent of the Senate and commissioned by the President, they are not exempted from that executive power, which by the Constitution is vested in the President of the United

States over all civil officers appointed by him, and whose tenures of office are not made by the Constitution itself more stable than during the pleasure of the President of the United States.

That the President has, by the Constitution of the United States, the power of removing civil officers appointed and commissioned by him, by and with the advice and consent of the Senate, *where the Constitution itself* has not otherwise provided, by fixing the tenure during good behavior, has been long since settled, and has ceased to be a subject of controversy or doubt.

In the great debate which arose upon that question in the House of Representatives, shortly after the adoption of the Constitution, Mr. Madison is reported to have said: "It is absolutely necessary that the President should have the power of removing from office; it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself if he suffers them to perpetrate, with impunity, high crimes or misdemeanors against the United States, or neglects to superintend their conduct so as to check their excesses. On the constitutionality of the declaration, I have no manner of doubt."

And the determination of Congress was in accordance with his views, and has been since invariably followed in practice by every President of the United States. From this power the judges appointed for the Territories of the United States are not excepted. That these territorial judges were appointed under a law which limited their commissions to the term of four years does by no means imply that they shall continue in office during that term, howsoever they may misbehave. An express declaration in the statute that they should not, during the term,

be removed from office, would have been in conflict with the Constitution, and would have precluded either the House of Representatives or the President from the exercise of their respective powers of impeachment or removal. The law intended no more than that these officers should certainly, at the end of that term, be either out of office or subjected again to the scrutiny of the Senate upon a renomination.

When it is proposed that this power of removal shall be exerted upon a judge appointed for the administration of justice to the people of a territorial government, it must be admitted that caution and circumspection should be used. But the power of removal is vested by the Constitution in the President of the United States to promote the public welfare, to enable him to take care that the laws be faithfully executed, and to make him responsible if he suffers those to remain in office who are manifestly unfit and unworthy of public confidence.

Attorney-General Cushing said to the President in 1856 (8 Op., 223, 232):

> Now, in regard to civil officers, the construction of the Constitution was fixed, as all admit, past change, on occasion of the debates in the First Congress concerning the bills for the organization of the Executive Departments. (See Gales & Seaton's Annals, vol. 1, p. 456 et seq.) I say past change, for the result of the earnest discussion of the question in the Twenty-third Congress, when the subject was revived for the very purpose, would appear to be decisive on that point. (See Gales & Seaton's Congress. Debates, Vols. X and XI.) And the established practice of the Government on this point has passed into the state of equally established constitutional doctrine.

Attorney-General Devens advised the President in 1878 (15 Op., 421):

> The power to dismiss officers from the military service of the United States, whether Army or Navy, was repeatedly and frequently exercised from the time of the adoption of the Constitution; such power is not found in express terms in the Constitution, but according to the contemporaneous construction given to it, which was followed from that time to the time referred to, inclusive, it was repeatedly held by the Attorneys-General, when the question was submitted to them or was incidentally necessary to be decided, that the authority thus to dismiss was possessed by the President. * * * That the President has this power has not, so far as I know, been controverted by any adjudged case or by the opinion of any Attorney-General, although it has been questioned by certain text writers.

Attorney-General Cushing's view as to the force of practical construction of the Constitution on this question is stated in his argument in the case of *United States* v. *Guthrie*, supra, where Mr. Justice McLean quotes him (p. 305) as asserting—

> That the power of the President was discussed and settled by Congress in the commencement of the Federal Government. That the power of the President to remove all officers, who *by the Constitution itself* were not declared to hold their offices during good behavior, was sustained by both houses and that this power was recognized in the establishment of the Department of Foreign Affairs.

still other cases the intimation has been that he might be removed by the President, but nowhere throughout such legislation has there been an intimation against the power of the President to remove or in favor of the power existing anywhere else to control his judgment. It will be noted that in many cases the legislation has been silent as to method of appointment and in others has expressly declared it in the very words of the Constitution. Exactly the same result is attained in either case.

I present quotations from the original acts creating most of the executive officers up to the time of the civil war.

Secretary of State: July 27, 1789 (1 Stat. L., 28):

> And there shall be a principal officer therein to be called the Secretary for the Department of Foreign Affairs. * * *
>
> SEC. 2. * * * And who [the chief clerk], whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall, during such vacancy, have the charge and custody of all records. * * *

Secretary of War: August 7, 1789 (1 Stat. L., 49):

> There shall be an executive department to be denominated the Department of War, and that there shall be a principal officer therein, to be called the Secretary for the Department of War. * * *
>
> SEC. 2. * * * And who [the chief clerk], whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall, during such vacancy, have the charge and custody. * * *

Secretary of the Treasury: September 2, 1789 (1 Stat. L., 65):

> There shall be a Department of Treasury, in which shall be the following officers, namely, a secretary of the Treasury, to be deemed head of the department, a comptroller, an auditor, a treasurer, a register, and an assistant to the Secretary of the Treasury, which said assistant shall be appointed by the said secretary. * * *
>
> SEC. 7. Whenever the Secretary shall be removed from office by the President of the United States, or in any other case of vacancy in the office of Secretary, the assistant shall, during the vacancy, have the charge. * * * [No provision with reference to the removal of the other officers.]

Attorney-General: September 24, 1789 (1 Stat. L., 93):

> SEC. 35. And there shall also be appointed a meet person, learned in the law, to act as Attorney-General for the United States. [No provision with reference to method of appointment or removal.]

Postmaster-General: May 8, 1789 (1 Stat. L., 357):

> SEC. 3. * * * There shall be one Postmaster-General, who shall have authority to appoint an assistant. * * * [No provision with reference to removal.]

Secretary of the Navy: April 30, 1789 (1 Stat. L., 553):

> There shall be an executive department under the denomination of the Department of the Navy, the chief officer of which shall be called the Secretary of the Navy. * * *
>
> SEC. 2. * * * In case of vacancy in the office of the Secretary, by removal or otherwise, it shall be the duty of the principal clerk to take charge. * * *

And also by the passage of the bill in 1789, and its approval by the President, was resolved, among others, the following points (p. 307):

> That in a republican government public offices are created for the benefit of the people, that the officer does not hold a private estate and property in the office, and when the officer is unfit, for any cause whatever, he ought to be displaced and another appointed, for the benefit of the people and their security, or if the office be found upon experience to be unnecessary, it should be abolished.

To these overwhelming adoptions of the early legislative construction is to be added the uniform practice since 1789 up at least to the tenure-of-office act of 1867, on the part of all Presidents from Washington onward, to remove any or all executive officers when in their judgment such step was demanded. Appellants quote, on pages 20–26 of their brief from historians, enough to establish this proposition. Those quotations make it clear that removals were continually made, and were made entirely in the discretion of the Presidents. Nowhere among those authorities is it suggested that the President ever submitted to any other tribunal the sufficiency of the cause upon which he exercised his prerogative to remove, or that claim was ever made that any other tribunal had any right to review those causes. The utmost that can be claimed by the appellant, even from the historical authorities which he has selected, is that the judgments of earlier Presidents demanded other and different causes than the later ones have deemed adequate.

It is suggested, though not established, that difference in party politics was not in the earlier days considered a

sufficient cause for removals. If that be so, it may well be that in the earlier days of the Republic the partisanship of public officers had not acquired such virulence as to destroy their usefulness to a chief executive of a different political party. For anything that appears in this record, it may be that never before was there a district attorney whose partisanship was such as to obstruct him in aiding his chief. It should be noted, however, that there is no evidence or suggestion anywhere that the appellant himself was removed for political reasons; that is an assumption by him not creditable to his modesty. Affirmative misconduct, criminal or otherwise, is, of course, not necessary. Whenever the case arises that the President has lost confidence in an executive officer, no matter how intangible may be the acts destroying that confidence, whether ill health, failing mind, personal habits, political antagonism, or anything else, it is not only permissible, but highly proper, that removals should take place.

c. Subsequent Congressional practice.

Since 1789 and up to the turmoil of the civil war all legislation of Congress creating executive offices has proceeded upon the assumed power of the President to remove when in his official judgment removal ought to take place. In many cases the officer has been created without any designated term, which means indefinitely or until impeached, unless there be power of removal somewhere. In other cases the officer has been created to hold thus indefinitely, with an intimation that he might be removed, but without intimating by whom. In

Secretary of the Interior: March 3, 1849 (9 Stat. L., 395):

> The head of which department shall be called the Secretary of the Interior, who shall be appointed by the President of the United States, by and with the advice and consent of the Senate, and who shall hold his office by the same tenure and receive the same salary as the Secretaries of the other Executive Departments. * * * [No provision as to removal.]

Comptroller, Auditors, Register of the Treasury: Originally created September 2, 1789 (1 Stat. L., 65). Already quoted in connection with the Secretary of the Treasury; no provision whatever as to their removal.

Act of March 3, 1817 (3 Stat. L., 366):

> SEC. 3. That from and after the third day of March next, in addition to the officers in the Treasury Department, already established by law, there shall be the following officers, namely, four Auditors and one Comptroller. [No provision whatever with reference to method of appointment or removal.]

Marshals: September 24, 1789 (1 Stat. L., 87):

> SEC. 27. That a marshal shall be appointed in and for each district for the term of four years, but shall be removed from office at pleasure.

District attorneys: September 24, 1789 (1 Stat. L., 92):

> SEC. 35. * * * And there shall be appointed in each district, a meet person, learned in the law, to act as attorney for the United States in such district. [No provision whatever with reference to method of appointment or removal.]

May 15, 1820 (3 Stat. L., 582):

> All district attorneys, collectors of the customs, naval officers, * * * shall be appointed for

the term of four years, but shall be removable from office at pleasure.

Commissioner of the General Land Office: April 25, 1812 (2 Stat. L., 716):

There shall be established in the Department of the Treasury, an office to be denominated the General Land Office, the chief officer of which shall be called the Commissioner of the General Land Office, whose duty it shall be * * * .

SEC. 11. That the Commissioner of the said Land Office shall be appointed by the President of the United States, by and with the advice and consent of the Senate. [No provision as to method of removal.]

Commissioner of Indian Affairs: July 9, 1832 (4 Stat. L., 564):

The President shall appoint, by and with the advice and consent of the Senate, a Commissioner of Indian Affairs * * *. [No provision whatever as to term or removal.]

Commissioner of Pensions: March 2, 1833 (4 Stat. L., 622):

And a Commissioner of Pensions shall be appointed by the President and Senate, who shall receive a salary of $2,500, which is hereby appropriated * * *. But this provision shall only continue until the expiration of the next Congress.

Commissioner of Customs: March 3, 1849 (9 Stat. L., 396):

SEC. 12. That an officer shall be appointed by the President of the United States, by and with the advice

and consent of the Senate, in the Department of the Treasury, * * * to be called the Commissioner of Customs, who shall perform * * *, who shall hold his office by the same tenure and receive the same amount of salary as the First Auditor of the Treasury. [No provision as to method of removal.]

Assistant Secretary of State: March 3, 1853 (10 Stat. L. 212):

SEC. 6. That an officer shall be appointed in the Department of State to be called the Assistant Secretary of State. [No provision as to method of appointment or removal.]

July 25, 1866 (14 Stat. L., 226):

SEC. 2. That the President be and he is hereby authorized to appoint, by and with the advice and consent of the Senate, a Second Assistant Secretary of State in the Department of State, and also an Examiner of Claims for the same department, whose salary, etc. [No provision as to term or removal from office.]

Assistant Secretary of the Treasury, March 3, 1857, (11 Stat. L., 220):

SEC. 5. That the assistant Secretary of the Treasury shall be appointed by the President by and with the advice and consent of the Senate. [There exists no provision as to term or method of removal.]

d. No instances to the contrary.

This practical construction of 1789 and recognition of its finality and correctness have been practically unbroken.

In but three cases in this court, in the whole history of the country, has anything been said which even appel-

lant can construe as derogatory to the constitutional power of the President to remove executive officers appointed by him, by and with the advice and consent of the Senate. Those three cases are *Marbury* v. *Madison* (1 Cranch, 137), *U. S.* v. *Guthrie* (17 How., 284), and *McAllister* v. *U. S.* (141 U. S., 188). In each of those cases the remarks were obiter and arguendo. In none of them was the right of the officer ever sustained as a result of any such remarks or reasoning. Independently of this, however, each of them was entirely distinguishable from the present case, in that, first, the officer was not an officer of the United States, but an officer of the District of Columbia or of one of the Territories; secondly, because the officer was not executive, but judicial.

The cases themselves note and expressly go upon the *first* of these distinctions, namely, that the officers were territorial or district, and that the Constitution had vested in Congress full and plenary power to provide for the government both of the District of Columbia and of the Territories, and that Congress has always assumed so to do. There have been created territorial officers, both executive and judicial, to be appointed by other territorial officers or to be elected by the people. They have even created territorial legislatures with power to legislate, neither of which can find any authority in the Constitution except the comprehensive and general power of Congress over territorial government as distinguished from Federal.

Mr. Justice Harlan, in speaking for the court in the decision of the McAllister Case, says:

> The whole subject of the organization of territorial courts, the tenure by which the judges of such courts shall hold their offices, the salary they receive, and the manner in which they may be removed or suspended from office, was left by the Constitution with Congress under its plenary powers over the Territories of the United States (p. 188).

And again, after quoting from *Marbury* v. *Madison* the remarks as to the inviolability of the five-year term for justices of the peace in the District of Columbia, which are so strenuously urged by appellants here, he proceeds (p. 189):

> Nothing in those observations militates, in any degree, against the views we have expressed. On the contrary, the Chief Justice asserted the authority of Congress to fix the term of a justice of the peace in the District of Columbia beyond the power of the President to lessen it by his removal, or by withholding his commission after his appointment has been made, pursuant to an act of Congress, by and with the advice and consent of the Senate, and after the commission has been signed by the President and sealed by the Secretary of State. * * *
>
> The decision in the present case is a recognition of the complete authority of Congress over territorial offices in virtue of those general powers which that body possesses over the territory of the United States, as *Marbury* v. *Madison* was a recognition of the power of Congress over the term of office of a justice of the peace for the District of Columbia.

In the *McAllister* Case I find that the brief of Solicitor-General Taft expressly disclaims consideration of

the constitutional power of the President, believing the statute sufficient for that case, and the court so held.

The *Guthrie* Case had reference to the rights of the chief justice of the Territory of Minnesota, but there the court declined entirely to consider his rights to the office or to the salary thereof, and contented itself with denying a mandamus against the Secretary of the Treasury.

The *second* distinction is pointed out in the dissenting opinions in both the *Guthrie* Case and the *McAllister* Case. In each of tnose the dissent went upon the grounds that the officer in question was a judicial officer and was therefore not within the reasons which support the power of the President to remove obstructive executive officers, either in construing the Constitution or in construing the tenure of office acts.

To my mind this latter distinction is a cogent one. It seems to me that the reason which makes necessary absolute power in the Chief Executive to remove subordinates who stand in the way of the execution of the laws have no force to support a power of removal of judicial officers who are not the aids and subordinates of the President of the United States in his executive functions, and that, therefore, while "all executive power" includes the former it does not include the latter.

It must be remembered continually that the right to remove was originally settled and is to be maintained, not from the power to appoint, and not from inference at all, but from the direct constitutional grant of "*the executive power*," because the removal of a subordinate executive

officer is an executive act and a necessary element of the executive power. It is erroneous to say, as has so often been said in debate, and as is said by the appellant's counsel in their brief, that this is an implied or inferred and not a granted power. If, as contended by Madison, it is an executive power, then it is an expressly granted one and must be without limit, except as that limit is found in the words of the Constitution itself.

Judge Deady is also quoted at length, by counsel for appellants, in the case of *U. S.* v. *Avery* (Deady's Reports, 204), but there again the arguments which counsel quote, and which Judge Deady makes apparently in all sincerity, are found by him as a judge not to be sufficient to control his decision, and he proceeds to decide, in antagonism to the reasoning which the counsel quotes, that the act of the President was valid and did remove the defendant Avery from office, although no such power was given by the statute to the President. The officer in that case had an unlimited term, with no express reservation of any power of removal.

But once in the history of the country up to the civil war did Congress ever make any assault upon the existence of absolute discretion in the power of removal of executive officers, as vested in the President by the Constitution, and that was on the occasion of the anomalous combination of Webster, Clay, and Calhoun to attack and destroy Andrew Jackson. That, however, was a recognition that he had the power, and merely an effort to require him to report his reasons to the Senate, not for any action by that body, but as a moral restraint on the President. The result of that effort and the overwhelming retraction

of the action then had, upon deliberate review, both by Congress and the people, is set forth in the language of Mr. Evarts in a previous portion of this brief, and need not be reiterated here. Suffice it to say that the result of such review and retraction was to confirm by the court of ultimate resort, the people of the United States, the construction placed upon the Constitution under the guiding wisdom of Madison in the first Congress, that to the President had been granted the power of removal of executive officers, and that his power is beyond the ability of Congress to restrict.

e. Tenure-of-office act an aberration.

The tenure-of-office act of 1867 was a distinct departure from the constitutional restriction upon Congress against interfering with the executive power of the President in the matter of removals. It was, however, one of those numerous phases of the excitement, the alarm, the suspicion and the bitterness which characterized the period of the civil war—a period when the Constitution came to be looked upon as nowhere restrictive in detail, so long as the purpose of the acts proposed by its friends looked toward the ultimate maintenance of the Government under the general lines of that great instrument; when the gospel of the Constitution was found only in the commandment that if an eye or a hand offend, it be cast away, in order that the whole might live. Considerations of whether the Constitution permitted or prohibited a certain act were seldom long debated. If, in the judgment of those who had the preservation of the Government at heart, it

seemed necessary that the Constitution should be disregarded, that was done unhesitatingly, and the six years of such custom which had preceded 1867, made it easy for the overwhelming majority of those, who antagonized the policy of Andrew Johnson and who feared and distrusted him personally, to disregard constitutional restraints upon their power, and to pass enactments in the expectation that some practical effect might be given to their legislation.

In those days Congress had passed and the Supreme Court had justified the enforcement of income-tax laws. In those days Congress did not hesitate to say that the President should not be the Commander in Chief of the Army and Navy, which the Constitution had made him. And in those days private rights of property or even liberty guaranteed by the Constitution were made to yield in order that there might be any Constitution left under which the country might live. In 1864 was the first attempt on the part of Congress in the history of our country to claim paramount control over an international subject formerly considered executive: In that general period was had the civil rights legislation considered by this court in *United States* v. *Reese*, 92 U. S., 214; *United States* v. *Harris*, 106 U. S., 629, and civil rights cases, 109 U. S., 3.

While the recognition of the necessity and the courage, in deference thereto, to ignore the restrictions of the organic law, were marks of greatness in the men who so fully appreciated the emergency, yet such ignoring must not be taken as constitutional construction. This court from time to time has had already, and will have in the

future, to face the proposition, that many of the acts passed during the sixties, are to be taken hardly at all as expressing the opinion even of the men who advocated them, that they were constitutional.

This court, in *Blake* v. *United States* (supra), has, albeit in the mildest of language, called attention to the peculiar circumstances under which the tenure-of-office act was passed. Mr. Justice Harlan in delivering the opinion of the court in that case (p. 235), speaking of the restriction of the act of 1866 upon the power of the President over the removal of military officers, that act having been passed during the same period of exasperation between Congress and the President as was the tenure-of-office act, said:

> It [the act] is supposed to have been suggested by the serious differences existing, or which were apprehended, between the legislative and executive branches of the Government in reference to the enforcement, in the States lately in rebellion, of the reconstruction acts of Congress. * * * Hence, by way of preparation for the conflict then apprehended between the Executive and Legislative Departments, as to the enforcement of those acts, Congress by the fifth section of the act of July 13, 1866, repealed not only the seventeenth section of the act of July 17, 1862, but also the resolution of April 4, 1862. * * *

Mr. Cox, of North Carolina, who from the committee reported the bill for the repeal of the tenure-of-office act, spoke as follows:

> This measure was hastily brought forward and unadvisedly enacted in order to accomplish a temporary purpose.

Indeed, the House in its impatience, as might be then expected, went even beyond the Senate in the harshness of its propositions. In the conference committee between the two Houses the extreme measure of the House, to wit, to deprive the President of the power to remove a member of his cabinet (even though a spy in his political family), was denied, a thing unprecedented or even suggested prior to that time.

Now comes the singular part of this history. But the hottest wrath is soonest cooled. Another election was held. The sober second thought returned, and though the Republican majority was increased in this Congress a bill was introduced and passed for the repeal of this very law by an overwhelming majority, 138 to 16. The Senate did not concur. In the ensuing year a like bill passed by 159 for the repeal to 25 against it. In 1870 a similar bill passed the House without a division.

So that we have seen that no such enactment as the one we are now seeking to repeal ever marred the statute books of this country prior to the bitter and acrimonious controversy which existed between President Johnson and the American Congress. It was literally a measure arising out of the suspicions and mistrust of an internecine war. It was war legislation, which should now be repealed. (Cong. Record, vol. 18, part 3, p. 2698.)

Mr. Long, now Secretary of the Navy, in the same debate, speaking of the tenure-of-office act of 1867, said:

It was passed as a makeshift, as we all know. When it was passed, there was certainly an impression abroad that it would be repealed as soon as the contingency which it was intended to meet was past. (*Ibid.*, p. 2699.)

The propriety of the tenure of office act, as well as its constitutionality, was immediately assaulted. In the very next Congress, as stated by Mr. Cox, quoted above, a a bill to repeal it was carried through the House of Representatives, again overwhelmingly Republican, by a vote of 138 to 16. In 1869 a like bill was passed by the House by 159 to 25, and in 1870, without division.

One of the first steps under the bill was the impeachment of Andrew Johnson for having violated the tenure-of-office act and removed the Secretary of War. The constitutionality of the act was vigorously debated upon that trial, and the managers of the impeachment, in a Senate overwhelmingly filled with men most bitterly antagonistic to the President, after the debate did not dare to put to vote the question of the guilt of the President in exercising what he claimed was his constitutional power; he was allowed to stand acquitted on that article without a vote being taken, notwithstanding the efforts of his friends to obtain one. The opinions of Senators, quoted by appellants, were *dissenting* opinions, overruled by the decision of the Court of Impeachment.

In 1869 President Grant assailed the act in the following language:

> It could not have been the intention of the framers of the Constitution, when providing that appointments made by the President should receive the consent of the Senate, that the latter should have the power to retain in office persons placed there by Federal appointment against the will of the President. The law is inconsistent with a faithful and efficient administration of the Government. What faith can an Executive put in officials forced upon

him, and those, too, whom he has suspended for reason? How will such officials be likely to serve an Administration which they know does not trust them? (Cong. Record, vol. 18, part 3, p. 2699.)

And every President who had been elected up to 1887 renewed the recommendation for repeal.

The debates upon the repeal of the tenure of office act, which are found in vol. 18, of the Congressional Record, show that that repeal went overwhelmingly upon the ground that the act had been repugnant to the Constitution, the construction of which had become settled by seventy-five years of practical construction before it was passed, and its repeal passed the Senate notwithstanding all the interest of that body in maintaining a prerogative attempted to be granted by the act, by a vote of 30 to 22. It passed the House by 172 to 67.

Thus again, as in Jackson's time, it was established as the result of experience and as a result of continued attention of the people of the country, through their Representatives, to the subject, that the attempt to infringe upon the constitutional prerogative of the President had been wrong, and, in the language of the committee report under which the repeal was passed, the law was again made to "stand as it stood from the foundation of the Government, up to 1867, when in a time of great party excitement the said legislation was enacted, which, to say the least, was unusual, and tended to embarrass the President in the exercise of his constitutional prerogative." (H. R. Rep. 3539, Forty-ninth Congress, second session.)

The debate upon the final passage of the civil-service acts regulating the methods of appointment of inferior officers, which under the Constitution Congress was empowered to vest either in the President or in the heads of the departments or in the courts, shows that at that time, in 1883, it was the understanding in Congress that the power of the President over removals of executive officers was a constitutional one and not to be affected. That law was carefully framed so as to restrict only the *appointment*, even of the inferior officers. Of course, the purpose of the act, namely, to create a certain degree of permanence and avoid political removals of inferior officers, would have been best accomplished by provisions expressly restricting removals. The fact that such express restriction was not attempted is therefore significant of the opinion of Congress on this question, but it is rendered clearer by an examination of certain debates which took place.

Mr. Brown questioned the bill because in practical working it was expected to restrain removals by the President. Senator Hawley, of Connecticut, who reported the bill, explained that while it was hoped that the obstacles thrown in the way of political appointments would have a moral restraining influence upon removals, because of the slight political benefit to be secured thereby, yet no attempt was made in the bill to directly restrict the power. Mr. Brown then moved as an amendment (14 Congressional Record, p. 282):

> *Provided*, That nothing in this act shall prevent the removal by the President or any head of a department of any officer or employee under him,

> when he thinks the interest of the public requires it, without being obliged to assign any cause for such action.

To this Mr. Jones, of Florida, replied:

> I do not think we can take away the powers of the President under the Constitution by any bill we may pass.

And the amendment was lost, apparently because it was unnecessary.

f. In conclusion.

It seems to me that never before has a construction of the Constitution been brought before this court for reversal which was so overwhelmingly sustained by the conduct, upon debate and considerately, of the legislature in session, of the Executive in action, and of the courts in expression.

That construction, as I have shown, commenced with the first Congress after the Constitution had been adopted. In that House of Representatives, of whose vote alone we have record, were seven members of the Constitutional Convention, of whom six voted in favor of the construction there adopted, that the power of removal of executive officers was an executive power, and conferred upon the President expressly among all "the executive power," and therefore not to be impaired or restrained by Congress.

It would be impossible for me to add arguments in favor of the necessity of this power to those presented by Mr. Madison and the others above quoted. I may point out, however, a practical illustration or two, which have since shown that necessity.

In the last months of President Buchanan's Administration Mr. Floyd, who was Secretary of War, was claimed to be in full sympathy with the traitorous purposes of the prospective secessionists, and devoting himself not to aiding the President in defending the Constitution of the United States, but aiding the secessionists by placing in their territory the arms and munitions of war which were likely to be needed for that defense. At that time the Senate contained enough members in sympathy with Mr. Floyd to have prevented any speedy action, either in the event of impeachment or in the event of submission by the President to that body of the propriety of removal. Can an Executive see that the laws are executed or can he defend the Constitution of the United States when he can not remove from office an officer like this?

Recently a spirit has arisen in many parts of the country in favor of the breaking of our neutrality laws whereby our international duty to another nation has been most difficult of performance, whereby our treaty has been and is being strained nearly to the point of fracture. The executive officers in some parts of the country, holding under a four-year tenure of office according to the contention of the appellants, have been imbued with the spirit of their surroundings. The President might have found it impossible through them to have "seen to it that the laws were enforced," that those citizens of this country who were attempting to break them and perhaps plunge us into war with a foreign nation were punished unless he had had the power to hold the threat of immediate removal over the heads of his subordinates through whom he was obliged to act. Had he been

obliged to submit the question of their removal to the Senate for their concurrence, or had he been obliged to wait for the House of Representatives to move by impeachment, the performance of his executive duty would have been rendered impossible. The mere fact that the power of removal existed in him was sufficient to create a spirit of loyalty and cooperation in his subordinate officers so that the ax did not need to fall, but to that result it was necessary that his hand alone should hold the ax.

An experiment has somewhat recently been made in New York, whereby the power of removal of members of the police force has been taken away from the police commissioners, whose immediate subordinate the force is, and to whom the government looks to make that force effective; also the power of removal of the police commissioners has been taken away from the governor, each of such superier executives being required in the event of disapproval of any subordinate to carry their complaints to some other tribunal not responsible for the efficiency of the executive force. I think I may venture to say that it is common knowledge that under that method have developed two results, first, the serious depreciation in the efficiency, morale, and discipline of the police force, and, secondly, much diminution of that high sense of responsibility which needs to rest on an important executive officer, and from which, where it existed, there has resulted throughout the history of this country, in an overwhelming majority of cases, response in the form of faithful devotion to the purposes of the office.

We have thus far been using the expression "power of the President to remove," but not in the sense in which appellant's counsel seem to view it. Their point of view seems to be either on the one hand that the President has a personal privilege which is given to him for the purpose of being exercised for his private entertainment, spite, or other purposes, or, on the other hand, that the law has withheld that power from him in order to give a private personal property in an office to the appointee. Neither of these points of view is right. The powers given by the Constitution to the President of the United States have been given him in order to create duties, and it is an agreeable reflection that as the responsibilities have been high, the spirit and purpose of the Chief Magistrate has responded.

I believe that we never have had a President who entered upon the Presidential office without having as his guiding and predominant purpose the honest performance of its duties and the promotion of the welfare of the country, and I venture to prophesy that, as long as the dignity and the responsibilities of that office are kept as transcendant as they have been in the past, the men who take that high station in the future will take it in the same spirit, ready in the main to subordinate that which promotes their own comfort, ease, or private interests to such performance of their duties as the public service demands.

The power is not given to the President to remove a public officer merely for the sake of satisfying the President's wishes, but in order to impose upon him a duty

to so remove when in his judgment the officer is not efficient or is less efficient than some one else who can be obtained. It matters not that no tribunal has been created to review the President's acts, either in removing or in refraining therefrom. The presumption is apparent all through the Constitution that the high officers may in many respects be left merely to the sanction of their own conscience; their duty being declared by the Constitution, they may be relied on to perform it without having either court, Congress, or other superior behind them to direct.

This power, established by the framers of our Constitution and found by more than a century of experience so necessary that in all that history only twice has it been assaulted by Congressional action, and that in moments of most violent and bitter antagonism to the person holding the Chief Magistracy, should not at this day be diminished, especially when, as now, there comes to the high responsibilities of the Presidential office a new incumbent, who takes his place amidst rumors of wars and strained amity with other nations; amidst a spirit of turbulence and resistance to what by large classes are believed to be inequitable and unjust laws, but which are still laws which that Chief Magistrate must, under his oath of office, execute. He should not enter upon that task bereft of the right enjoyed by his predecessors, to be aided by loyal, devoted subordinates in place of any who he finds are not helpful or not in sympathy with his purposes.

II.

THE LEGISLATION ESTABLISHING THE OFFICE OF DISTRICT ATTORNEYS IS A LIMITATION ON THE TERM, AND NOT A GRANT.

The district attorneys were first created by the judiciary act of September 24, 1789, at the same session at which the discussion of the constitutional power of the President had taken place, and while the decision therein reached was fresh in the minds of all members of Congress.

By section 35 of said act (1 Stat. L., 92) it is provided:

> There shall be appointed in each district a meet person, learned in the law, to act as attorney for the United States in such district.

This is the entire substance of the act. There is no intimation as to who shall appoint, there is no limit placed to the term, which, but for the constitutional power of the President to remove, would be perpetual.

By the practice the Constitution was read into this act and the appointments were made, under the terms of the Constitution, by the President, with the advice and consent of the Senate, and the removals were made by the President. This continued without change until 1820, when was passed the act of May 15 of that year (3 Stat. L., 582), "An act to *limit* the term of office of certain officers therein named," which provided:

> That from and after the passing of this act, all district attorneys, collectors of customs, naval officers and surveyors of the customs, navy agents, receivers of public moneys for lands, registers of the land

offices, paymasters in the army, the apothecary-general, the assistant apothecaries general, and the commissary-general of purchases, to be appointed under the laws of the United States, shall be appointed for the term of four years, but shall be removable from office at pleasure.

SEC. 2. That the commission of each and every of the officers named in the first section of this act, now in office, unless vacated by removal from office, or otherwise, shall cease and expire in the manner following: All such commissions bearing date on or before the 30th day of September, 1814, shall cease and expire on the day and month of their respective dates, which shall next ensue after the 30th day of September next; all such commissions bearing date after the said 30th day of September, in the year 1814, and before the 1st day of October, 1816, shall cease and expire on the day and month of their respective dates which shall next ensue after the 30th day of September, 1821. And all other commissions shall cease and expire at the expiration of the term of four years from their respective dates.

It is obvious, first, from the title, which is "to *limit* the term of office," and, second, from the addition of section 2, relating to officers who had already been in office more than four years, that the purpose in the mind of Congress was limitation and not grant. The provision that they should be appointed for four years, with removal from office at pleasure, gave no additional tenure, for under the law as before existing they were to hold indefinitely, except for the same right of removal at pleasure of the President. It was therefore a shortening and not a lengthening of their term of office which was in the mind of Congress.

This continued to be the law with reference to district attorneys until the tenure-of-office act of 1867, to which reference has already been made, which prohibited their removal within their term, otherwise than by the President and Senate in conjunction, which being a provision of statute, inconsistent with the existing statutory provision, that they should be removable at the pleasure of the President, would, if valid, have superseded and repealed that power if depending on statute. The adoption of the Revised Statutes in 1874 was merely an attempt to declare the law as it was understood to be, namely, as providing a term of office for four years, subject to any constitutional powers of removal which existed anywhere, but subject to the attempted statutory provision against removal without concurrence of the Senate, and the expression in the act of 1820, "but shall be removable at pleasure," was omitted as unnecessary or as inconsistent with the prohibitions of the tenure of office acts.

But even if the original act of 1820 had omitted all reference to a removal within the four-year term, instead of allowing such omission to creep in among various modifications obviously by accident, still the true construction would have implied a legislative recognition of power to remove.

There is, of course, no more inconsistency in the implication that the officer is subject to removal, by the recognized authority, in case of an act limiting the term to four years, than that of an act leaving the term without limit. There is exactly the same argument that the officer in the latter case holds permanently, not subject

to removal, as in the former, that he holds for four years. Even appellant's counsel would admit some exception to have been intended by Congress. They certainly *intended* to leave these four-year officers subject to impeachment, because they could not prevent it, but their words, according to appellant's construction, would have excluded even that. If, then, we may infer that Congress intended an exception in favor of the constitutional power of impeachment, why not that they also intended exception in favor of the executive power of removal, which had always been recognized as equally general and constitutional. I quote again a part of Attorney-General Cushing's opinion (5 Op., 290):

> That these Territorial judges were appointed under a law which limited their commissions to the term of four years does by no means imply that they shall continue in office during that term howsoever they may misbehave. An express declaration in the statute that they should not, during the term, be removed from office, would have been in conflict with the Constitution, and would have precluded either the House of Representatives or the President from the exercise of their respective powers of impeachment or removal. The law intended no more than that these officers should certainly, at the end of that term, be either out of office or subjected again to the scrutiny of the Senate upon a renomination.

The necessity for the executive power is the same. Inability for four years to remove a traitorous Secretary of War in the incipiency of a rebellion is as bad as inability until he can be impeached. Inability for four years to remove a reluctant or disobedient district attor-

ney or marshal in a filibustering district or in time of insurrection is as destructive of the President's power to see that the laws are executed as if he never could be removed but by impeachment.

Judge Davis, on behalf of the Court of Claims, in the case of Howard, a Territorial judge with a four-year term, decided in connection with the McAllister Case, which was afterwards affirmed, says (22 C. Cls., 305, 316):

> It has been the unvarying practice of all Presidents to remove from office a civil officer when in their opinion it seemed wise to do so. Nor has the fact that the officer held a commission for a term of years ever been held to give him greater legal right than though it ran during the pleasure of the President.

An entirely analogous case is presented under the Constitution. As to recess vacancies, it is provided that the President may fill them "by granting commissions which shall expire at the end of their (Senate's) next session." This is just as much a term as if the commission were to expire at the end of one year or four years. This term, however, was always treated as subject to the discretion of the President, and we find that in 1813 President Madison used a form of commission to declare that construction and made his interim appointments to hold "during the pleasure of the President and until the end of the next session of the Senate." (See *U. S.* v. *Kirkpatrick*, 9 Wheat., 720, 731.)

Again, in the McAllister Case, where the statute in plainest words granted a four years' term, it was held that there was no inference of a purpose to cut off the preexisting general statutory authority to remove any

more than there would have been in case of an indefinite term. On the contrary, it was decided that in using the words "to hold for a term of four years," Congress must have been understood to have intended to imply "subject to the general powers of removal heretofore existing."

The doctrine contended for by appellants, that a statute limiting a fixed term for an office creates an estate or property in the officer which can not be taken away, is disposed of by this court in *Crenshaw* v. *U. S.* (134 U. S., 99), in which the court, speaking by Mr. Justice Lamar, say (108):

> Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege, revocable by the sovereignty at will, and one legislature can not deprive its successor of the power of revocation.

It was true the court was there considering a legislative revocation of the office, but the principle is the same, as stated in the debates in the First Congress, that offices are not created by way of benefit or estate, as in some monarchical countries, but for the welfare of the community, and the tenure is always subject to a reservation in favor of that purpose.

Mr. Justice McLean, who dissented from the majority opinion in the case of *U. S.* v. *Guthrie* (17 How., 284), and whom we have already quoted, refers to the argument of Attorney-General Cushing in that case as containing—

> That in a republican government public offices are created for the benefit of the people; that the officer does not hold a private estate and property in the

> office, and when the officer is unfit for any cause whatever he ought to be displaced and another appointed for the benefit of the people and their security, or if the office itself be found upon experience to be unnecessary it should be abolished.

Justice McLean then goes on to add, "the policy expressed in this resolution must be admitted by every intelligent individual who understands and appreciates our system of government."

III.

Act of 1887 was not intended to restrict the powers of the President, but to remove restrictions thereon.

That the act repealing the tenure-of-office statutes was not intended by Congress as establishing definite terms of office for district attorneys and certain other officers, so that they were not subject to removal otherwise than by impeachment is, of course, obvious from all the circumstances attending that repeal. If the result contended for by claimant has been accomplished it has been accomplished by accident and contrary to the Congressional purpose.

The repeal measure, as we have shown elsewhere, was introduced and passed in the House over and over again, always on the assertion that it was an interference with the executive power which, whether valid or invalid, ought to be removed.

The framework of the tenure-of-office acts and the circumstances under which they passed showed that they were intended by Congress to be restrictive of preexisting power of removal, and not a *grant* of power to remove. Previous to their passage, there could have been

no contention against the power of the President alone to remove at his discretion. Their purpose, confessed and declared, was to endeavor to limit that power and require the consent of the Senate thereto, whether constitutional or not. Their repeal, it is equally obvious from all of the discussion accompanying it, was for the purpose of removing a limitation, and not for the purpose of taking away a grant of power to remove officers.

Senator Hoar introduced the repealing measure, which became a law in 1887, and it became Senate bill 512 of the Forty-ninth Congress. Senator Hoar also reported it from Committee. It was first called up in the Senate on December 13, 1886. (Cong. Record, vol. 18, p. 113.) There being no printed report, Mr. Hoar, as representing the committee reporting it, was called on to explain, and I take it his statement of the effect and character of the bill stands, therefore, in the nature of a committee report. He said in reply to that inquiry:

> Mr. President, this bill repeals what is left of what is called the tenure-of-office act, passed under the Administration of Andrew Johnson, and as a part of the contest with that President. It leaves the law as it was from the beginning of the Government until that time, and it repeals the provision which authorizes the suspension of civil officers and requires the submission of that suspension to the Senate. Every member of this body who has been a member of the House of Representatives—and I think there is a very large number—has voted for that repeal. Several times it was urged very earnestly by President Grant. It has been urged by every successor of his, I believe, and I suppose there are not five gentlemen in the Senate who object to that repeal.

In the House of Representatives the bill was referred to the Committee on Reform in the Civil Service, and Mr. Cox, from that committee, submitted a written report, to which reference has heretofore been made, No. 3539, second session Forty-ninth Congress. In that report it is stated:

> The reasons for the foregoing recommendation are, that by the repeal of sections 1767, 1768, 1769, 1770, 1771, and 1772, Revised Statutes of the United States, the law will then stand as it stood from the foundation of the Government up to 1867, when, in a time of great party excitement, the said legislation was enacted, which, to say the least, was unusual and tended to embarrass the President in the exercise of his constitutional prerogative.

It should be remembered that the recognition of liability to removal of district attorneys and all other officers having a term of office had been persistently inserted in every statute, in order that Congress might not be suspected of having even attempted to attack the executive prerogative, and it was only after the recognized attack was made in the tenure-of-office acts, whereby the cooperation of the Senate was attempted to be required, that in modifying the laws in the Revised Statutes, attempting to declare them as they were supposed to exist in the year 1873, those express recognitions of power of removal as to the various officers were dropped out, and that fact was obviously overlooked by Congress when they attempted to go back to the old system. The sections limiting such terms are remote and disconnected from the tenure-of-office sections. This puts us directly in that position which is described by Mr. Justice Shiras

in *Saltonstall* v. *Birtwell* (164 U. S., 54), where was found a phrase in a statute giving a color to the statute as amended different from that which Congress had evidently purposed. The court, speaking by Mr. Justice Shiras, said:

> It is urged that the phrase "under protest," in the first part of section 3011, is inconsistent with this view. But it is not unusual, in a succession of statutes on the same subject-matter amending or modifying previous provisions, that a word or phrase may remain, although rendered useless or meaningless by the amendments. Such words are merely vestigial, and should not be permitted to impair or defeat the fair meaning of the enactment.

If it is equally apparent that, instead of a phrase, an *omission* has been perpetuated, which, given its full effect, would be inconsistent with the new state of the legislation, there seems no reason why the courts can not as well discover and enforce that purpose as in the event of a redundant or vestigial phrase. Why may not the omission of a phrase be "vestigial" as well as the presence of one.

The repeal statute has received persistent construction at the hands of the Executive, confirmed by the Senate and never criticised by Congress, consistent only with the reinstatement of the President in his old prerogative of removing when in his official judgment removal should be made.

An examination of the books of the appointment divisions of the Department of Justice and of the Treasury Department discloses that of district attorneys, marshals,

collectors of customs, surveyors of ports, and naval officers of ports, all of whom are in the same statutory condition with reference to term, there have been removals since the passage of the repealing act of March 3, 1887, as specified below; that such removals have been in the main by the President alone, and in few cases by a nomination of a successor and his confirmation by the Senate. From that table it will further appear that instead of the intrusting of full responsibility in the President, resulting in growth of the abuse, if removals are an abuse, the contrary is true, and that each year presents fewer removals than marked the corresponding year of the preceding Administration. The following is the table:

1887.	
Attorneys	1
Marshals	2
Collectors	4
1888.	
Collectors	4
1889.	
District attorneys	21
Marshals	21
Collectors	24
Surveyors	10
Naval officers	3
1890.	
District attorneys	4
Marshals	8
Collectors	24
Surveyors	5
1891.	
Marshals	2
Collectors	5
Surveyors	1
1892.	
Marshals	1
Collectors	2
1893.	
District attorneys	10
Marshals	9
Collectors	17
Surveyors	4
Naval officers	2
1894.	
District attorneys	1
Marshals	3
Collectors	9
Surveyors	2
1895.	
Collectors	1
1896.	
District attorneys	1
Marshals	1
Collectors	2

I therefore respectfully submit that the President, in the removal of claimant, exercised a power conferred on him by the Constitution, and which Congress could not take away or impair if they would; but whether that be so or not, no legislation exists which intends to prohibit either the removal made by the President alone or that made with the advice and consent of the Senate.

JOSHUA ERIC DODGE,
Assistant Attorney-General.

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